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Concerted Practices in Distribution Networks: Comparative Insights from EU and Ukrainian Competition Law

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Abstract

This master's thesis analyzes the legal concept and enforcement of concerted practices in distribution networks through a comparative study of EU competition law - particularly Article 101 TFEU and associated regulatory and soft-law instruments - and Ukrainian competition law as established by the Law on Protection of Economic Competition and the practice of the Antimonopoly Committee of Ukraine (AMCU). The research addresses both vertical conduct, such as resale price maintenance and territorial or customer restrictions, and horizontal coordination, including price-fixing, market sharing, and output coordination, as well as hybrid hub-and-spoke scenarios. Central to the analysis is the distinction each legal system draws between unlawful coordination and lawful parallel conduct, and the evidentiary standards authorities use to prove tacit coordination in the absence of formal agreements. The thesis also examines contemporary enforcement challenges in digital markets, such as platform-mediated information exchange, algorithmic pricing, and data-sharing mechanisms, and considers EU-inspired policy directions - including the Digital Markets Act - that may influence Ukraine's regulatory approach. Employing a doctrinal methodology and comparative evaluation of legal standards and enforcement practices, the study identifies key areas of convergence and divergence and evaluates the impact of the EU–Ukraine Association Agreement on Ukraine's ongoing legal alignment and future reform priorities.

Abstrakt

Diese Masterarbeit analysiert das rechtliche Konzept und die Durchsetzung von abgestimmten Verhaltensweisen in Vertriebsnetzen anhand einer vergleichenden Studie des EU-Wettbewerbsrechts – insbesondere Artikel 101 AEUV und damit verbundene Regulierungs- und Soft-Law-Instrumente – und des ukrainischen Wettbewerbsrechts, wie es durch das Gesetz zum Schutz des wirtschaftlichen Wettbewerbs und die Praxis der Antimonopolkommission der Ukraine (AMCU) festgelegt ist. Die Untersuchung befasst sich sowohl mit vertikalen Verhaltensweisen wie Preisbindungen und Gebiets- oder Kundenbeschränkungen als auch mit horizontaler Koordinierung, einschließlich Preisabsprachen, Marktaufteilung und Produktionskoordinierung, sowie mit hybriden Hub-and-Spoke-Szenarien. Im Mittelpunkt der Analyse steht die Unterscheidung, die jedes Rechtssystem zwischen unrechtmäßiger Koordinierung und rechtmäßigem Parallelverhalten trifft, sowie die Beweisstandards, die die Behörden anwenden, um stillschweigende Koordinierung ohne formelle Vereinbarungen nachzuweisen. Die Arbeit untersucht auch aktuelle Herausforderungen bei der Durchsetzung in digitalen Märkten, wie den plattformvermittelten Informationsaustausch, algorithmische Preisgestaltung und Datenaustauschmechanismen, und berücksichtigt von der EU inspirierte politische Leitlinien – einschließlich des Gesetzes über digitale Märkte –, die den Regulierungsansatz der Ukraine beeinflussen könnten. Unter Verwendung einer dogmatischen Methodik und einer vergleichenden Bewertung von Rechtsstandards und Durchsetzungspraktiken identifiziert die Studie wichtige Bereiche der Konvergenz und Divergenz und bewertet die Auswirkungen des Assoziierungsabkommens zwischen der EU und der Ukraine auf die laufende Rechtsangleichung und die künftige Reform der Ukraine.

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LIST OF ABBREVIATIONS

AG	Advocate General (of the Court of Justice of the European Union)
AI	Artificial Intelligence
AMCU	Antimonopoly Committee of Ukraine
ATB	ATB (Ukrainian supermarket chain; as referenced in the “retailers’ case” example)
BER	Block Exemption Regulation
BV	*Besloten Vennootschap* (Dutch private limited company form)
DMA	Digital Markets Act
DOJ	(United States) Department of Justice
EC	European Community (e.g., “EC Treaty”)
ECJ	European Court of Justice (Court of Justice of the European Union)
ECN	European Competition Network
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
HBERs	Horizontal Block Exemption Regulations
ICI	Imperial Chemical Industries (case party in *ICI v Commission*)
IT	Information Technology
LPEC	Law of Ukraine “On Protection of Economic Competition”
LPG	Liquefied Petroleum Gas
METRO	METRO (retail chain; as referenced in the “retailers’ case” example)
MFN	Most-Favoured-Nation (parity) clause
NCA / NCAs	National Competition Authority / National Competition Authorities
OECD	Organisation for Economic Co-operation and Development

OFT	(UK) Office of Fair Trading
R&D	Research and Development
RPM	Resale Price Maintenance
RRP	Recommended Resale Price
SME	Small and Medium-sized Enterprise(s)
SSNIP	Small but Significant and Non-transitory Increase in Price
TFEU	Treaty on the Functioning of the European Union
UAH	Ukrainian Hryvnia
UK	United Kingdom
U.S.	United States
U.S.C.	United States Code
USSR	Union of Soviet Socialist Republics
VBER	Vertical Block Exemption Regulation

CHAPTER 1 – INTRODUCTION

1.1 Subject Matter of the Research and Topic Overview

The regulation of concerted practices in distribution networks is fundamental for preserving a competitive market environment that advances economic efficiency and protects consumer rights. In Ukraine, the development of the legal and regulatory framework – determined by the Law on Protection of Economic Competition (2001, as amended) and the EU-Ukraine Association Agreement (2014) – accentuates the necessity of matching with EU competition law standards, particularly Article 101 of the Treaty on the Functioning of the European Union (TFEU). The rapid expansion of digital markets, where algorithmic pricing and data sharing facilitate nuanced forms of coordination, heightens the criticality of dealing with these practices. Difficulties encountered by the Antimonopoly Committee of Ukraine (AMCU), including limited technology infrastructure and an underdeveloped leniency program, underline the need to examine how Ukraine can effectively regulate concerted practices to promote healthy competition across traditional and digital distribution networks.

This thesis examines the legal concept and regulatory treatment of concerted practices within distribution networks through a comparative analysis of the competition law frameworks of the European Union (EU) and Ukraine. Concerted practices, as defined in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and Article 6 of Ukraine's Law on Protection of Economic Competition (2001, as amended) (LPEC), encompass forms of coordination among undertakings that, without constituting formal agreements, knowingly replace competitive behavior with practical cooperation, thereby restricting market competition. The analysis addresses both vertical concerted practices (involving undertakings at different levels of the supply chain, such as manufacturers and distributors) and horizontal concerted practices (involving competitors at the same market level), acknowledging their distinct yet interconnected roles in distorting competitive conditions within distribution networks.

The analysis centers on the legal qualification of concerted practices, which necessitates an assessment of the undertakings' intent, the market effects of their conduct, and the degree of independence in their decision-making processes. Vertical concerted practices in distribution networks, such as resale price maintenance (RPM) and territorial or customer allocation, are evaluated for their potential to restrict market access, elevate prices, or diminish consumer welfare. Concurrently, horizontal concerted practices – including price-fixing, market sharing, and coordinated output restrictions among competitors–are considered, particularly in scenarios where distribution networks enable indirect coordination (for example, hub-and-spoke arrangements involving a common supplier or distributor). Such practices may arise through explicit agreements or tacit coordination, including the exchange of commercially sensitive information (such as pricing strategies, production capacities, or market allocation plans), thereby reducing strategic uncertainty and weakening competitive rivalry.

Within the European Union, the relevant legal framework is constituted by Article 101 TFEU, Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (the Vertical Block Exemption Regulation, or VBER), the Commission Notice – Guidelines on vertical restraints [2022] (the Guidelines on vertical restraints), and the Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] (the Horizontal Guidelines). These instruments set forth criteria for evaluating both vertical and horizontal coordination, emphasizing the prohibition of practices with an anticompetitive object or effect. In Ukraine, the framework is based on the Law on Protection of Economic Competition and the enforcement activities of the Antimonopoly Committee of Ukraine (AMCU), which are increasingly aligned with EU standards pursuant to the EU–Ukraine Association Agreement (2014). This study investigates how each jurisdiction differentiates concerted practices from lawful parallel conduct and explores the evidentiary challenges associated with identifying tacit coordination, especially in the absence of formal agreements.

The analysis places particular emphasis on contemporary challenges in regulating concerted practices, such as the influence of online platforms, algorithmic pricing, and information exchange mechanisms. In vertical contexts, digital markets increase the risk of anticompetitive coordination through automated pricing tools or platform-mediated information exchanges. In horizontal contexts, algorithms and data analytics can facilitate tacit collusion among competitors without direct communication, thereby complicating enforcement. Through a comparison of the EU's established competition law regime and

Ukraine's developing framework, the research identifies shared principles, jurisdictional differences, and the impact of EU legal doctrine on Ukrainian enforcement practices. The findings contribute to the academic discourse on competition law convergence and provide practical guidance for regulators and practitioners addressing the complexities of vertical and horizontal coordination in contemporary supply chains.

This study offers a novel contribution through its comprehensive analysis of Ukraine's legal and regulatory framework for concerted practices in distribution networks, with particular attention to challenges arising from digital markets. Distinct from prior research, the thesis incorporates practical case studies from Ukraine and conducts a comparative examination of EU case law to identify gaps in Ukraine's enforcement capabilities, especially regarding the detection of algorithmic coordination. The focus on proposing digital-specific regulatory solutions, drawing on EU digital regulations such as the Digital Markets Act, introduces a forward-looking perspective and addresses an underexplored area within Ukrainian competition law scholarship.

1.2 Objectives, Research Limitations, and Methodology

This research attempts to systematically examine the regulatory structures governing concerted practices within distribution networks, with a comparative emphasis on the European Union (EU) and Ukrainian competition law regimes. It examines both vertical concerted practices, such as distribution, resale price maintenance (RPM), and territorial restrictions, and horizontal concerted practices, including price-fixing, market sharing, and output coordination among competitors. These practices, which may occur independently or by means of hybrid arrangements such as hub-and-spoke coordination, are significant because of their power to distort market forces. Accordingly, the study pursues several connected objectives. First, it seeks to clarify the legal benchmarks employed in the EU and Ukraine to differentiate concerted practices from lawful parallel conduct, focusing on intent, market effects, and evidence of coordination in the absence of formal agreements. Second, it evaluates the circumstances under which vertical and horizontal arrangements within distribution networks are considered anticompetitive, assessing their effects on market access, price competition, consumer welfare, and innovation.

The examination further compares the EU's established competition law framework, based on Article 101 of the Treaty on the Functioning of the European Union (TFEU), the

Vertical Block Exemption Regulation, Guidelines on vertical restraints, HBERs and the Horizontal Guidelines (2023), with Ukraine's developing framework under the Law on Protection of Economic Competition (2001, as amended) and the practices of enforcement applied by the Antimonopoly Committee of Ukraine (AMCU). Additionally, it analyzes the methods by which the European Commission, the European Court of Justice (ECJ), and the AMCU detect, prove, and sanction concerted practices, with particular attention to issues posed by tacit coordination, internet platforms, algorithmic pricing, and data distribution mechanisms. Finally, the study considers the extent to which EU competition law standards, as incorporated through the EU–Ukraine Association Agreement (2014), shape Ukrainian legal doctrine and enforcement actions in dealing with both vertical and horizontal concerted practices. Through these objectives, the research furthers the academic discussion on competition law convergence and delivers insights into the interaction between vertical and horizontal coordination in contemporary supply chains.

The scope of this study is subject to several limitations. The analysis is limited to concerted practices in distribution networks (vertical and horizontal) coordination and specifically omits alternative types of anticompetitive behaviour including formal arrangements, abuse of dominance under Article 102 TFEU or its equivalent Ukrainian provisions, and merger control. Second, the study covers legislation, case law, and enforcement actions until June 2025, in its entirety, but without referring to any reforms, unpublished regulation, or proposed legislative evolution beyond this time frame. The study adopts a doctrinal and comparative legal approach, focusing on legal analysis and interpretation, and does not utilize empirical or econometric methods to quantify the market impact of concerted practices, such as price effects or consumer welfare losses. The jurisdictional focus is limited to the EU and Ukraine, with references to other jurisdictions, such as the United States, included only when relevant to the theoretical or juridical development of concerted practices. Finally, while the study examines challenges raised by internet platforms and algorithmic coordination, it is limited by the developing nature of these technologies and the scarcity of comprehensive case law or regulatory guidance as of 2025. These limitations give a focused scope and determine areas for future research.

To achieve its objectives, this research adopts a doctrinal legal methodology, supplemented by a comparative examination of the EU and Ukrainian competition law frameworks. It thoroughly reviews primary European and Ukrainian legal sources, decisions of the European Commission and the AMCU, and regulatory guidelines in Ukraine, with reference to the EU–Ukraine Association Agreement (2014). Landmark ECJ rulings, such as *ICI v. Commission* (1972), *T-Mobile Netherlands* (2009), and *ANIC Partecipazioni* (1999), together with the respective Ukrainian case-law, are analyzed to trace the development of legal benchmarks for identifying and sanctioning concerted practices. The comparative approach points out normative and institutional similarities and differences, examining legal definitions, proof standards, enforcement techniques, and the influence of EU legal doctrine on Ukrainian practices. The study also draws on secondary sources, including academic literature, policy reports, and expert commentaries, to critique and interpret changing standards. Additionally, it incorporates a contextual analysis of current market developments, such like internet platforms, algorithmic pricing, and information exchange practices, to evaluate their effect on both vertical and horizontal coordination. By combining doctrinal, comparative, and contextual approaches, this system offers a thorough framework for investigating the legal treatment and enforcement issues associated with concerted practices in the EU and Ukraine, thereby aiding a subtle understanding of competition law convergence in globalized and digitalized markets.

CHAPTER 2 – CONCERTED PRACTICES: CONCEPTUAL FOUNDATIONS AND ECONOMIC CONSIDERATIONS

2.1 Conceptual Foundations of Concerted Practices in Competition Law

Under competition law, a concerted practice is a mode of cooperation between firms which does not amount to signing the same contract and nevertheless limits the degree of competition. This idea is at the heart of EU competition law, and it enables protection for colluding behavior that potentially can't be covered by the traditional ideas about agreement. In other words, it is for when companies, by a shared understanding based on mutual behavior, "knowingly substitute practical cooperation for the risks of competition."[1] This chapter examines the concept in terms of the genesis and theoretical background of EU law, with reference to U.S. antitrust underpinnings.

The theoretical roots of concerted practices trace back to early U.S. antitrust jurisprudence under the Sherman Act 1890, which banned any "contract, combination, or conspiracy" in restraint of trade (15 U.S.C. § 1).[2] U.S. courts established "concerted action" concept to deduce complicity, but even without a verbal contract. Interstate Circuit, Inc v United States (1939) is one of the watershed cases in that case where the court inferred a conspiracy from the parallel conduct of film distributors receiving the same proposal and proceeding in lockstep; the Court ruled that the acceptance by competitors even "without previous agreement" of an invitation to participate in a plan whose necessary consequence is to restrain commerce is enough to establish an illegal conspiracy under the Sherman Act.[3] In other words, even absent a written contract, knowing adherence to a commonly proposed scheme amounted to "concerted action." U.S. courts have required "plus factors" (evidence of communication or conduct not explicable by coincidence) to distinguish collusion from mere conscious parallelism; mere parallel conduct, in a state of not yet sufficient corroborating evidence, is not itself unlawful, as the Supreme Court reasoned in Theatre Enterprises v Paramount (1954).[4] Subsequent rulings stress that proof need "tend to exclude the possibility of independent action," highlighting just how high the evidential bar is before concerted action can be proven. This observation – which states that in order to condemn

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[1] Martynas Jablonskis, 'Concerted Practices: Concept and Evolution' (2022) 8(1) *International Comparative Jurisprudence* 13, 15–17.
[2] Sherman Antitrust Act 1890 (15 USC § 1).
[3] *Interstate Circuit Inc v United States* 306 US 208 (1939).
[4] *Theatre Enterprises Inc v Paramount Film Distributing Corp 346 US 537, 541–42 (1954).*

parallel business behaviour there must be some form of mutual understanding or inter-firm contact–had an outsized impact on European perspectives on concerted practice.

The notion of "concerted practices" was first implemented in European competition law, in the 1950s. Precisely, concerted practices were barred in a competition provision in the Treaty of Paris 1951 which created the European Coal and Steel Community (ECSC). Article 65(1) ECSC prohibited "all agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition" in the coal and steel market.[5] This marked the official debut of the term concerted practices in a legal text. When the Treaty of Rome 1957 later created the EEC, its Article 85(1) (now Article 101(1) TFEU) similarly prohibited "agreements… and concerted practices" affecting trade between member states and restricting competition.[6]

For one thing, the European treaties' emphasis on concerted practices drew much of their inspiration from U.S. antitrust. (the legal source is to the U.S. notion of "concerted action," with the Supreme Court's reasoning in Interstate Circuit (1939) frequently cited as a standard for deducing collusion absent a formal contract. Though there existed a French doctrine of actions concertées (in fact, France declared concerted conduct illegal in national law by way of a decree in 1953), scholarly examination suggests that concerted practices entered the EU via the ECSC Treaty before French law, and that American antitrust law spurred its incorporation within European law.[7] As one scholar puts it: "the term concerted practices firstly appeared in Article 65 of the Paris Treaty (1951) rather than in French law. Hence, U.S. antitrust law must have instigated the adoption of concerted practices in EU competition law.[8] In short, the drafters of Europe's competition rules equipped the new system with a tool to capture tacit collusion even when firms had not inked a formal cartel agreement deliberating so the strategy to close gaps in anti-cartel enforcement: cartel behavior should not escape liability merely because it isn't formalized in a contract.

According to Martynas Jablonskis, European law adopted a "bifurcation of a conceptual scheme into cartel agreements and concerted practices," whereas the American

[5] Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951) art 65(1).
[6] Treaty establishing the European Economic Community (Rome, 25 March 1957) art 85(1).
[7] Décret n° 53-704 du 9 août 1953 dit décret anti-trust réglementant les ententes professionnelles et rétablissant la libre concurrence (France).
[8] Jablonskis (n 1) 14.

approach relies on a single unified concept of agreement to cover all forms of collusion. The concerted practice concept in Article 101 TFEU thus serves as a “Plan B” – it is intended “to catch the remaining cartels… with the least direct incriminating evidence” when an outright agreement cannot be proven.[9]

European case law has elaborated on the definition of a concerted practice in contrast to a plain agreement. The classic definition originated from the European Court of Justice (ECJ) in its ICI v Commission (Dyestuffs) judgment in 1972. In that holding, the Court characterized a concerted practice as “a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.” Such coordination can in itself be demonstrated “inter alia… by coordination which is discernible from the behavior of the participants.”.[10] More simply defined, firms undertaking a concerted practice are intentionally or not willingly cooperating rather than competing but without a formal agreement. The key difference is that an agreement means a meeting of minds – an oral or written promise by the parties not to act in another way – while a concerted practice refers to looser varieties of cooperation where neither one has entered a formal deal, but who actively decide to align their conduct.

Professor Giorgio Monti illustratively demonstrates the point for the distinction on this: “If two competitors enter into a contract to set the same price for their goods, this is an unlawful agreement; [but] if two competitors meet and exchange information about their intended commercial policy, this is a concerted practice only when the parties take this information into account in devising their future commercial policy.”[11] That is to say, exchange of information or other indirect practices of coordination can constitute concerted practice if it is followed by parallel conduct, even in the absence of a binding agreement. Monti’s example makes clear that the distinction between an “agreement” as opposed to a “concerted practice” is not so much a matter of substance as one of form and degree – both are collusive devices. Indeed, the ECJ has noted that the “dividing line between agreements and concerted practices cannot be easily determined”.[12] An informal gentlemen’s agreement

[9] Ibid, 15–16.
[10] *Imperial Chemical Industries Ltd v Commission* (Case 48/69) [1972] ECR 619, paras 64–66.
[11] Giorgio Monti, EC Competition Law (Cambridge University Press 2007).
[12] Opinion of AG Mayras in Imperial Chemical Industries Ltd v Commission (Case 48/69) [1972] ECR 619.

may be viewed as an agreement, whereas a subtle exchange of nods and winks leading to parallel pricing is treated as a concerted practice – yet both situations undermine competition. The practical significance of maintaining two concepts is arguably limited because any collusive outcome is prohibited regardless of form. In fact, the ECJ eventually held that it need not even categorize an infringement as an agreement or a concerted practice when the evidence shows a collusive outcome – firms are often found liable for "agreements and/or concerted practices" under Article 101.[13] This flexibility in characterization, while legally convenient, has been criticized for blurring the conceptual boundaries and reducing clarity in the doctrine.[14]

Nevertheless, the notion of concerted practice has an important theoretical role: it affirms that competition can be restrained by coordinated conduct in the absence of a formal contract. It targets the "least formal form of collusion" – the scenarios where firms reach a "mental consensus" or mutual understanding and adjust their conduct accordingly, but might not have a enforceable pact. In comparison to an agreement, a concerted practice is thus seen as a "less intense form of collusion", potentially a precursor to a full-fledged agreement.[15] Indeed, "any concerted practice may potentially turn into a cartel agreement, but not the reverse".[16] This gradation highlights that concerted practices are conceived as a residual category to catch coordination that skirts the formalities of a contract.

To establish a concerted practice in a legal sense, European authorities and courts look for several constitutive elements that must be present in the evidence. Drawing from the case law (notably *T-Mobile Netherlands* and earlier decisions as will be shown in the next chapter) and academic analyses, three key elements can be identified:[17]

Contact or Communication between Competitors: At least one form of mutual contact or information exchange or other interaction should take place. Without contact, independently parallel conduct is not sufficient. This contact can be direct (meetings, calls, correspondence) or indirect (from a third party or signalling in public). It shows that the firms were not doing it in perfect isolation. Meetings and conversations between participants

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13 Commission v Anic Partecipazioni SpA (Case C-49/92 P) [1999] ECR I-4125, paras 124, 131–34.
14 Jablonskis (n 1) 15–17.
15 Tréfilunion SA v Commission (Case T-148/89) [1995] ECR II-1063.
16 Jablonskis (n 1) 14–16.
17 T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit (Case C-8/08) [2009] ECR I-4529, paras 31, 51–53, 61–62.

in the market may serve positive reasons and benefit all parties concerned; however, as was already mentioned, attendance at these gatherings or talks may occasionally be evidence of engagement in anti-competitive behavior.[18]

Conscious Cooperation (Meeting of Minds): The two parties, at least indirectly, achieve a shared understanding or "mental consensus" that they will operate in a certain coordinated fashion. They do not necessarily need to formalise this understanding, but each participant knows that the other is also deviating from independent action. So essentially the firms align their behaviour on purpose – they know they are cooperating rather than competing. (Which frequently is a matter of inference from the facts anyway, a signatory to collude is unlikely to be explicit, by the way.)

Parallel Conduct with a Causal Cause: After the contact and consensus, the firms will engage in parallel or cooperative behavior in the market, and there is a causal link between the interaction and the conduct. Put another way, they function on terms of the cooperation that's occurred – that is, the two firms increase their price soon after exchanging future price intentions. The simultaneity and pattern of the behaviour alongside the previous communication point to the conduct being driven by this coordination

All three qualities act in combination to differentiate concerted practice from simple coincidence. European courts have had a very circumspect approach to insist on evidence of communication and subsequent parallel action so that firms are not punished for arriving at similar strategies based on coincidence, or the market. This was first expressed early on by Advocate General Mayras in Dyestuffs: he suggested that proving concertation requires showing both the "existence of a certain common will" and that the firms "in fact have acted in the same way" on the market.[19] Initially, the ECJ seemed to endorse this, implying that a concerted practice "must in fact have resulted in parallel conduct,[20] However, this strict view was later relaxed, as we will see – recognizing that even an unsuccessful or unimplemented coordination attempt is theoretically an infringement by object.[21] Still, as a practical matter,

[18] Michel Waelbroeck and Aldo Frignani, *European Competition Law* (Transnational Publishers 1999).
[19] Opinion of AG Mayras (n 12).
[20] Julien Ducourneau, 'Origins of "Concerted Practices" in European Antitrust Law' (EU Competition Law, New York Law School) <https://www.eucomplaw.com/concerted-practices/> accessed 15 March 2026.
[21] T-Mobile Netherlands (n 17) paras 29–31, 38–39, 61–62.

competition authorities usually demonstrate some change in market behavior consistent with the alleged coordination.

It is also worth noting that European enforcement has shown willingness to expand the concept's scope in unique ways. For instance, in the AC-Treuhand case, a consultancy that facilitated cartel meetings (but was not itself a competitor in the cartelised market) was held liable for participating in a concerted practice. This reflects a view of concerted practice as any knowing contribution to a collusive coordination, even if the contributor is not a direct market participant – again underscoring the broad, functional reach of the concept in service of cartel enforcement.[22]

From their inception, concerted practices have been as much about theory as enforcement. They're the opposite: an acknowledgment that competition can be stifled by the flicker of an eye, the sound of a wink, the simple nod of the head, without the old-fashioned gentlemen's agreement or written contract. At heart – theoretical foundations were shaped with great influence from early U.S. antitrust thought (that a conspiracy can easily be inferred from conduct and context), but the EU took that belief and turned it into a standalone legal concept enshrined in its treaties. The European courts and the commission have further refined the notion using case law over the decades: from the Interstate Circuit's conception of inferring conspiracy by invitation and parallel conduct to Dyestuffs' definition of concertation, Suiker Unie's basic pronouncements weighing the "right to adapt intelligently" with the prohibition on inter-firm contacts. That evolution continued through Wood Pulp, Anic, T-Mobile Netherlands and beyond, creating a doctrinal framework that is both intense, and in its broad strokes, controversial.

With regard to today's EU competition law, the concept of concerted practice has ensured that there exists no anti-competitive coordination that can escape simply for want of a formal agreement. It throws a wide net: any direct or indirect interaction that supports "practical cooperation" over independent competition is suspect. This very broad perspective has been key to the fight against modern cartels and other similar groups, which often do not sign legally binding agreements and instead depend on information exchanges over opaque channels with partners. Indeed, the law has since turned certain information

[22] AC-Treuhand AG v Commission (Case T-99/04) [2008] ECR II-1501; AC-Treuhand AG v Commission (Case C-194/14 P) EU:C:2015:717, paras 30–41; Opinion of AG Wahl in AC-Treuhand AG v Commission (Case C-194/14 P) EU:C:2015:350.

exchanges into essentially by-object infringements, a practice driven by enforcement that is an ongoing pillar of EU competition enforcement.

Looking ahead, the theoretical framework of concerted practices may face fresh challenges. Algorithmic collusion and tacit coordination via pricing algorithms, for example, could blur the lines between mere parallelism and programmed responses that mimic concertation. Scholars note that the current doctrine "was shaped before the age of the internet and virtual competition," and may need adaptation to remain effective.[23] That suggests a possible revival of interest in the core principles of the doctrine. Yet the fundamental principle is settled: competition law is clear that competition is not only prohibited by explicit agreements; also, by any form of knowing coordination that permits companies to waive trade uncertainty for the comfort of mutual comprehension. This principle – an early antitrust concept and an ideal that has been developed in European Union Law since the early days of the European Union – formed a theory behind the concerted-practices doctrine.

2.2. Economic Considerations of Concerted Practices

As touched on, concerted practices represent forms of coordination between firms that can significantly distort competition. Economically, such practices enable firms to achieve collusive outcomes – like higher prices or reduced output – without a formal pact. They can mirror the effects of explicit cartels, leading to welfare losses in the form of inflated prices, lower consumer surplus, impaired product quality, and dampened innovation.[24] From a legal perspective, competition law (exemplified by Article 101(1) of the TFEU) captures concerted practices to prevent companies from undermining market rivalry through tacit means. This dual economic and legal concern is underscored by the prevalence of collusive cases: by 2025, courts across 20 European countries had adjudicated at least 444 cartel damages actions involving over 90 cartels.[25] Clearly, concerted conduct even absent a formal

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[23] Jablonskis (n 1) 15–17; Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016); OECD, *Algorithms and Collusion: Competition Policy in the Digital Age* (OECD Publishing 2017) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/05/algorithms-and-collusion-competition-policy-in-the-digital-age_02371a73/258dcb14-en.pdf> accessed 15 March 2026.

[24] I Villamil, János Kertész and Mihály Fazekas, 'Collusion risk in corporate networks' (2024) 14 *Scientific Reports* 3161 (doi:10.1038/s41598-024-53625-9).

[25] Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges (2025 ed.)' (2025) Concurrences (No 7-2025) https://www.concurrences.com/IMG/pdf/7-2025_legal_practice_laborde-v4.pdf accessed 31 January 2026.

agreement – is both a serious economic problem and a core target of competition enforcement.

In oligopolistic markets with a few dominant firms, the incentive and ability to coordinate tacitly are especially pronounced. Economic theory recognizes “tacit collusion” as the ability of oligopolists to coordinate prices or outputs without explicit agreements, thereby raising profits at consumers’ expense.[26] Through repeated interactions and mutual awareness, firms may align their behavior (for example, avoiding price undercutting) to sustain supracompetitive prices. In practice, this means that even without any written contract or overt communication, rivals can develop parallel conduct – such as synchronized price increases or market sharing – that softens competition; however, mere parallelism, without evidence of concertation, is not in itself an infringement under Article 101 TFEU. The result is that prices tend to settle well above competitive levels (often far above marginal cost), and competitive pressure on each firm is significantly reduced. Essentially, each firm “knows” that aggressive competition is counterproductive, given that all players benefit from a quiet life.[27] This oligopolistic interdependence was famously described by Stigler and others,[28] and it underpins the EU concept of “concerted practices,” which targets coordination that substitutes practical cooperation for the risks of competition and includes conduct that removes strategic uncertainty about rivals’ intentions.

The economic harm from concerted practices in oligopolies is well documented. Prices under tacit collusion rise closer to monopoly levels, output and consumer choice decrease, and innovation incentives wane. Empirical evidence from cartel cases confirms substantial price effects. For instance, an econometric study of two notorious cartels (in lysine and citric acid) found that the conspirators were able to raise prices by approximately $0.09 and $0.25 per pound, respectively, during the collusive period compared to competitive benchmarks.[29] Such overcharges directly transfer wealth from consumers to producers and are often

[26] Massimo Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole, *The Economics of Tacit Collusion: Implications for Merger Control* (Final Report for DG Competition, European Commission, March 2003) 5–8 <https://idei.fr/sites/default/files/medias/doc/wp/2003/tacit_collusion.pdf> accessed 15 March 2026.

[27] John R Hicks, ‘Annual Survey of Economic Theory: The Theory of Monopoly’ (1935) 3 *Econometrica* 1, 8.

[28] George J Stigler, ‘A Theory of Oligopoly’ (1964) 72(1) *Journal of Political Economy* 44.

[29] Yuliya Bolotova, John M Connor and Douglas J Miller, ‘The Impact of Collusion on Price Behavior: Empirical Results from Two Recent Cases’ (October 2006) SSRN Electronic Journal <https://ssrn.com/abstract=991908> accessed 15 March 2026.

sustained for the duration of the coordination. Broader surveys of cartels in Europe show typical overcharge rates on the order of 10–15% of the affected price. In fact, courts in various European jurisdictions have quantified overcharge percentages ranging from <1% the mildest cases up to about 34% in the most extreme cases.[30] This means that in some collusive arrangements, consumers paid one-third more than they would have under competitive conditions. Table 1 below summarizes selected empirical indicators of collusion's impact:

Collusion Impact Metric	**Figure (EU studies)**
Typical cartel overcharge (median per case)	~10–14% price increase
Highest observed overcharge	34% price increase
Cartel price increases in specific cases	Lysine: \$0.25/lb; Citric Acid: \$0.09/lb
European Commission cartel decisions (1990–2025)	161 decisions adopted[31]

Table 1: Empirical indicators of collusive outcomes and enforcement. (Overcharge figures represent the percentage by which colluding firms inflated prices above the competitive level, as found by courts or studies. The EU Commission decisions count reflects the frequency of cartel enforcement, highlighting that concerted practices remain a persistent concern.)

These economic findings illustrate why competition authorities prioritize detecting and deterring concerted practices. Not only do such practices impose direct financial harm on consumers, but they also create allocative inefficiencies and can stifle dynamic competition (innovation and quality improvements).[32] Moreover, because tacit coordination can be self-enforcing (each firm expects rivals to punish deviation by reverting to competitive pricing, a form of retaliation), collusive outcomes can prove remarkably stable

[30] Laborde (n 25).

[31] European Commission, 'Cartels cases statistics' (updated 7 December 2023) <https://competition-policy.ec.europa.eu/system/files/2023-12/cartels_cases_statistics.pdf> accessed 15 March 2026.

[32] European Commission, *Modelling the Macroeconomic Impact of Competition Policy Interventions 2012–2022* (Joint Research Centre 2023) <https://competition-policy.ec.europa.eu/document/download/05570b1d-271e-46f4-b061-443ed9f4ea25_en> accessed 15 March 2026.

over time without any formal agreement.[33] This stability makes secret coordination attractive to oligopolists and all the more harmful to the competitive process.

At the same time, not every coordination happens between competitors direct to their firms; vertical relationships (suppliers and distributors, for example) can also lead to coordinated practices with economic costs. In distribution networks, manufacturers and retailers may "coordinate" terms of sale, territories or pricing policies.[34] Certain vertical restraints – like resale price maintenance (RPM) or exclusive distribution – can also limit intra-brand competition just as horizontal collusion does. For instance, when all retailers (presumably in cooperation with a supplier) agree to sell at a single price, consumers suffer from a cartel-like effect of uniform pricing and no price competition at the point of distribution. Acknowledging this, vertical agreements and concerted practices appear in antitrust law's prohibitions when they "undermine rivalry" or segment markets. Indeed, the EU's definition of concerted practice is sufficiently wide to capture any coordination between undertakings that substitutes for independent decision-making with cooperation, regardless if the undertakings are both competitors or are engaged in a supply-chain relationship.

However, the economic assessment of vertical practices often differs from that of horizontal cartels. Vertical coordination can sometimes produce efficiencies – for instance, ensuring adequate distribution investment, preventing free-riding among retailers, or optimizing inventory levels.[35] Thus, competition law takes a more nuanced approach in the vertical context, aiming to balance anti-competitive risks against potential efficiency gains. Article 101(3) TFEU gives a mechanism of exemption wherein, if a concerted practice (or agreement) "contributes to improving the production or distribution of goods or to helping to promote technical or economic progress, while giving consumers a fair share of the benefit" the practice may also be excluded from the general prohibition. In the EU, this principle has been operationalized through the Block Exemption Regulations (BERs) for specific types of agreements. Economically, this calibrated legal approach accepts that not every cooperation is bad. Vertical coordination can also, in some cases, improve efficiency

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[33] Edward J Green and Robert H Porter, 'Noncooperative Collusion under Imperfect Price Information' (1984) 52 *Econometrica* 87.
[34] Commission Notice – Guidelines on vertical restraints [2022] OJ C 248/1, paras 1–3, 18–22.
[35] Ibid, paras 12–16.

and consumer welfare – be it by improving distribution services, better matching production to consumer need or fostering innovation within franchise networks, for example. Benefits pro, such as those from the other hand are weighed against foreclosure or potential collusion risks of vertical production. Because of that, the enforcement view is not arbitrary but functional: concerted practices are condemned not simply because firms are coordinating, but because as horizontal behaviors they pose obvious collusive hazards, while as vertical behaviors some may be benign, or even beneficial. The law distinguishes benign collaboration from malign collusion through such criteria as market-share thresholds and the lack of hardcore restrictions for an agreement to qualify for exemption. For example, an exclusive distribution contract might be exempted if neither party exceeds 30% market share and it genuinely helps penetrate a new market, but a hidden arrangement among all big distributors to lock in resale prices would be a flagrant restriction of competition, clearly illegal. This balanced framework is evident in how the EU treats concerted practices in distribution: it discourages harmful collusion while allowing room for efficiency-enhancing arrangements that can spur investment and innovation in supply chains. In practice, firms taking advantage of these exemptions must ensure transparency and compliance with the conditions, as any abuse (such as disguising a cartel as a vertical agreement) would quickly strip away the legal protection.

2.3 Concluding Remarks

The economic and legal implications of concerted practices are profound. Enforcement is predicated on market understanding – enforcers turn increasingly to economic proof (pricing, communication records, information about the structure of the market) to determine the time when concerted practice has most likely occurred. Conversely, firm legal compliance-induced rules must incorporate economic concepts: In markets which are conducive to oligopolistic compliance, companies should be careful to be cautious that their act (even in the discreet case of public price announcements or algorithms) does not unintentionally indicate or create cooperation with rivals. Under EU law, the doctrines of competition have emerged over decades to align themselves with economic realities: anti-competitive practices can occur without the presence of formal contracts, and hence law aims to address behavioral equivalence between a cartel and players. This movement from the early "parallel behavior plus" rule as evidenced in the Dyestuffs case of the 1970s to the information-exchange regime in common today – as exemplified by T-Mobile – marks the meeting of both legal and economic approaches to the law. Crucially, the legal construct allows for some allowance in benign cooperation. It recognises the economic reality that cooperation is not necessarily zero-sum – sometimes, collaboration can increase welfare (Article 101(3) enables efficiencies as a defence and allows block exemptions). That balance is particularly important in confusing markets like digital platforms or franchise networks, where it can be difficult to disentangle harmful collusion from good faith cooperation. Recent policy updates by the European Commission (for instance, Vertical Block Exemption Regulation and horizontal cooperation agreement guidance) further fine-tune this balance and show where the line lies between permissible collaboration and unlawful concerted practice. Indeed, the EU model on concerted practices is an influential global exemplar. Similar harmonisation: More and more similar competition laws and enforcement practices are in place and jurisdictions such as Ukraine explicitly prohibit concerted actions and apply some of the analytical criteria as the EU. In Ukraine, for instance, a recent investigation by the country's Antimonopoly Committee now involves vertical restraints on distribution taking into account EU-style block exemption norms, and regards horizontal tacit coordination as a serious crime in the manner of a cartel. However, implementation in new regimes will be difficult (e.g. with the need for more institutional capacity and capacity to collect evidence) but the convergence underlines a common understanding of the economic risk of concerted practices. As markets evolve, competition authorities around the world are watching closely the issues of common-ownership collusion and algorithmic coordination, fields in which policy is still very much catching up with economic reality. Future efforts will need to keep expanding the conversation between economic research and legal policy. The point is to ensure that competition law stays good at detecting and preventing all types of coordination that can stifle competition while also not putting a lid on effective cooperative arrangements. Overall, concerted practices exist at that crossroads of economics and law: Only by bringing together insights of each discipline can regulators preserve the fine line between upholding competitive markets and fostering pro-competitive partnerships in a contemporary economy.

CHAPTER 3 – CONCERTED PRACTICES IN DISTRIBUTION NETWORKS: EU PERSPECTIVE

3.1 Development of the "Concerted Practices" Concept in the EU

At the heart of EU competition law, Article 101 of the Treaty on the Functioning of the European Union (TFEU) lays the groundwork by prohibiting agreements, decisions, and concerted practices that restrict competition. Article 101 TFEU is structured into three key paragraphs, each serving a distinct legal function. Paragraph 1 prohibits agreements, decisions, and concerted practices that may affect trade between Member States, each of which can be infringing if they have an anti-competitive object or effect. Paragraph 2 declares such arrangements automatically void, reinforcing the strict liability approach adopted under EU law. Meanwhile, Paragraph 3 introduces a limited exemption, allowing certain restrictive practices if they contribute to efficiency gains or technological progress and if consumers receive a fair share of the resulting benefit. This three-tiered structure highlights the EU's legal commitment to maintaining competition while acknowledging that, under specific conditions, certain forms of cooperation may yield net-positive economic outcomes.

Moreover, the notion of concerted practices has been largely developed through the case law of the European Court of Justice. In the seminal Consten & Grundig v Commission (1966), the Court of Justice underscored that the drafters intended to capture six distinct violations – three forms of coordination (agreements, decisions, concerted practices) each by object or by effect. Crucially, the Court held that *"for the purpose of applying Article 85 (1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."*[36] In other words, if a concerted practice (or other coordination) has an obvious anti-competitive object, proving actual market impact is unnecessary for it to be unlawful. This strict object-based approach – rooted in Consten & Grundig – reflects the preventative rationale of EU competition law, whereby clearly harmful conduct is condemned without requiring evidence of its consequences.[37]

[36] *Consten SARL and Grundig-Verkaufs GmbH v Commission* (Joined Cases 56 and 58/64) [1966] ECR 299, 342.

[37] Julien Ducourneau, 'Origins of "Concerted Practices" in European Antitrust Law' (EU Competition Law, New York Law School) <https://www.eucomplaw.com/concerted-practices/> accessed 15 March 2026.

The concept of concerted practice itself was first judicially defined in ICI v Commission (Dyestuffs) (1972). Here, the Court of Justice famously described a concerted practice as a form of coordination that *"knowingly substitutes practical cooperation for the risks of competition."* In Dyestuffs, although no formal agreement was found among dye manufacturers, the Court noted that near-identical price increases were implemented almost simultaneously across multiple countries – a pattern "hardly conceivable" without some form of coordination.[38] The Court inferred a concerted practice, reasoning that purely parallel conduct, if too uniform to be explained otherwise, may signal a hidden coordination. This case established an initial evidentiary framework: proof of parallel conduct in the market, combined with other indicia of contact or communication, could suffice to infer a concerted practice violating Article 101(1). Indeed, Advocate General Mayras, in Dyestuffs, proposed that two elements must be shown for a concerted practice:

(1) that the undertakings acted in parallel in the market, and
(2) the existence of a "common will"or shared rationale behind that parallel behavior.[39]

This effectively required evidence of de facto conduct (e.g. parallel pricing) plus a meeting of minds. The rationale was to avoid penalizing firms for mere conscious parallelism or innocent adaptation to competitors' behaviour – instead requiring a demonstrated *coordination* resulting in uniform action.

In a related strand, the Court in Suiker Unie (1975) reinforced that companies must determine their market conduct independently, and that *any direct or indirect contact* between competitors that influences a rival's conduct or reveals one's intended strategy is forbidden.[40] As the Court put it, while firms may intelligently adapt to each other's behavior, "it strictly precludes any direct or indirect contact... the object or effect whereof is to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor" one's intended course of action.[41] This early case law thus set the

[38] *Imperial Chemical Industries (ICI) v Commission* (Case 48/69) [1972] ECR 619, para 109.
[39] Opinion of AG Mayras (n 12) para 77.
[40] *Coöperatieve Vereniging 'Suiker Unie' UA v Commission* (Joined Cases 40–48/73 etc) [1975] ECR 1663, para 173.
[41] Ibid, para 174.

principle that exchange of sensitive information itself can amount to a concerted practice when it undermines the uncertainty that should exist between competitors.

Another foundational development came with the "Pioneer" (Musique Diffusion française) case in 1983, which extended the concept of concerted practices to vertical arrangements.[42] Prior cases largely addressed horizontal collusion (between competitors), but in Pioneer the Court dealt with a supplier coordinating an EU-wide exclusive distribution network. The Court cautioned that a firm in a "central position" – like a supplier dividing territories and hosting distributor meetings – must be vigilant that such coordination does not "give rise to practices contrary to the competition rules," even if the firm itself did not operate in the downstream market.[43] In effect, the hub-and-spoke scenario in Pioneer demonstrated that concerted practices could arise in vertical contexts when a supplier facilitates collusion among its distributors. This opened the door to treating certain vertical information exchanges or parallel conduct (such as collective resale price maintenance or market partitioning) as concerted practices, ensuring that the form of collusion (horizontal vs vertical) would not allow anti-competitive coordination to escape Article 101's reach.[44]

Throughout the 1980s and 1990s, the Court of Justice refined the evidentiary and legal standards for concerted practices, progressively lowering the requirement to prove tangible market effects or even explicit parallel conduct. A turning point was the Rhône-Poulenc v Commission case (1991), where Advocate General Vesterdorf revisited the Dyestuffs approach nearly two decades later.[45] AG Vesterdorf openly criticized AG Mayras's earlier "doctrine of attempt" – i.e. the notion that a concerted practice requires completed parallel conduct (an "attempt" being concertation not acted upon). He observed that Mayras's strict two-prong test had "not been supported or commented upon in later judgments" of the EU courts. In his opinion in Rhône-Poulenc (a cartel case involving price-fixing and quotas in industrial chemicals), Vesterdorf advocated a more flexible view: once concertation between firms is shown, "in principle concertation will automatically trigger subsequent action on the market" influenced by that coordination.[46] In other words, contact

[42] *SA Musique Diffusion française and Others v Commission* (Joined Cases 100–103/80) [1983] ECR 1825, paras 85–87.
[43] Ibid, para 105.
[44] Ducourneau (n 37).
[45] *Rhône-Poulenc v Commission* (Case T-1/89) [1991] ECR II-867.
[46] Opinion of AG Vesterdorf in *Rhône-Poulenc v Commission* (Case T-1/89) [1991] ECR II-867, para 272.

itself creates a presumption that the firms will adjust their conduct accordingly. Even if the firms do not immediately execute identical moves, the harm is in the substitution of cooperation for competition – the competitive risk is eliminated at the moment of the collusive contact. Although the Rhône-Poulenc case was resolved on other grounds, AG Vesterdorf's reasoning signaled the Court's shift: actual parallel behaviour was no longer a prerequisite for finding a concerted practice, so long as an anti-competitive understanding (or information exchange) was established.[47]

This trend continued in the Wood Pulp case (A. Ahlström Osakeyhtiö v Commission, 1993).[48] That case involved a complex inquiry into whether parallel pricing announcements by wood-pulp producers resulted from oligopolistic market transparency or unlawful coordination. In his Opinion, AG Darmon rejected the view that proof of *de facto* identical conduct must form part of the concept of a concerted practice, warning that such an approach "would lead to a particularly restrictive conception of the Treaty."[49] The Court ultimately annulled the Commission's finding of general concertation on announced prices in *Wood Pulp*, principally because the industry's structural characteristics (including a transparent, price-announcement system and oligopolistic tendencies) could plausibly explain parallel price movements without collusion. Nonetheless, *Wood Pulp* was doctrinally important: it further decoupled "concertation" from any necessity of uniform market conduct, cementing the principle that communication or information-sharing between competitors can infringe Article 101 where its object is to reduce uncertainty or coordinate behaviour, even if perfectly parallel outcomes are not observed.

In sum, by the early 1990s EU law had shifted from the early Dyestuffs approach – where parallel conduct was treated as (only) strong evidence if unexplained by normal market conditions – toward a broader prophylactic rule: any collusive contact that undermines independent decision-making is suspect, whether or not it immediately produces synchronized market moves.

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[47] See, for example, *Hüls AG v Commission* (Case C-199/92 P) [1999] ECR I-4287, para 161; *Commission v Anic Partecipazioni SpA* (Case C-49/92 P) [1999] ECR I-4125, para 121.
[48] *Ahlström Osakeyhtiö and Others v Commission* (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85) [1993] ECR I-1307, paras 63–64, 104, 126–27.
[49] Opinion of AG Darmon in *Ahlström Osakeyhtiö and Others v Commission* (Joined Cases C-89/85 etc) (delivered 7 July 1992) paras 185–86.

The Commission v Anic Partecipazioni judgment (1999) represents the culmination of this evolution in the 1990s. In Anic (Case C-49/92 P), the Court of Justice dealt head-on with a scenario of incomplete or intermittent participation in a cartel. Anic was a chemical producer implicated in a polypropylene cartel who argued that it could not be liable for periods where it did not attend meetings or implement cartel decisions.[50] The Court (upholding the Commission's appeal) took a strict stance: it confirmed that the "classification of a concerted practice by object" must be interpreted in light of the objective of competition rules, which is to safeguard the "free competition model" where each firm independently charts its conduct. Adopting the analysis of AG Cosmas, the Court ruled that an infringement is consummated "once there has been contact between undertakings with a view to disclosing the course of conduct which they contemplate adopting on the market."[51] The form or frequency of the contact is irrelevant – what matters is that the "spirit of the rules on competition" is breached at the moment companies abandon uncertainty for cooperation. In other words, the first limb of Article 101 (concertation itself) is sufficient to find a violation by object, without separately requiring the second limb (actual conduct) to be proved, as long as the concertation aimed to facilitate a restriction of competition. The Court explicitly jettisoned the necessity of de facto market parallelism: once a company participates in a collusive information exchange or planning, it cannot escape liability by showing it behaved differently at times or skipped some cartel meetings. The Anic judgment, therefore, solidified a presumption that if competitors meet or share sensitive information, they will take that information into account in their subsequent conduct unless proven otherwise. It also illustrated the Court's teleological approach – interpreting Article 101 in a way that best preserves its effectiveness (effet utile) in deterring all forms of collusion.

By the 2000s, the jurisprudence on concerted practices had established a strict liability regime for collusive contacts. The emphasis shifted to enforcing evidentiary presumptions that make it easier to prove an infringement, reflecting the EU's deterrence-based philosophy. A landmark example is T-Mobile Netherlands BV and Others (2009), where the Court was asked whether a single meeting between competitors sufficed to find a

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[50] *Commission v Anic Partecipazioni SpA* (Case C-49/92 P) [1999] ECR I-4125, paras 1–5, 79–81.
[51] Opinion of AG Cosmas in *Commission v Anic Partecipazioni SpA* (Case C-49/92 P) (delivered 15 July 1997) para 25.

concerted practice "by object," even absent evidence that the agreement was acted upon.[52] The case involved five Dutch mobile telecom operators who, in one meeting, exchanged sensitive information about reducing dealer commissions. The Court answered unequivocally that yes, even a one-off information exchange can violate Article 101 if it has an anti-competitive object. What matters is not whether the firms actually implemented a cartel or achieved higher prices, but simply whether the contact gave them the opportunity to adjust conduct in light of the shared information. In its judgment, the Court stated that "it is sufficient that the contact between competitors be capable of removing uncertainties concerning the intended conduct of the participating firms". In other words, the potential to harm competition by reducing strategic uncertainty is enough to constitute a breach – no need to show actual price-fixing, market allocation, or consumer harm resulting from that single meeting. The T-Mobile ruling underscored the preventive rationale of EU competition law: to deter and neutralize incipient collusion at the point of contact. Even if the anti-competitive outcome is not realized, the risk created by the concertation is deemed incompatible with Article 101's requirement of independent conduct. The law also presumes that undertakings remaining active on the market take account of the information exchanged, a presumption they can rebut only by adducing evidence that the contact had no effect on their conduct – an onerous task. Advocate General Kokott framed this in terms of effectiveness and proof standards, emphasizing that a single meeting may suffice and that national courts must apply principles that do not render enforcement excessively difficult."[53]

In parallel, the EU courts elaborated presumptions regarding participation and acquiescence in collusion. In Aalborg Portland and the related Cement Cartel appeals (ECJ 2004), the Court affirmed that an undertaking which takes part in meetings with competitors "without publicly distancing itself" or otherwise opposing what is discussed will be deemed a knowing participant in the cartel.[54] Simply being a passive attendee confers an appearance of support that tends to perpetuate the anti-competitive arrangement. This so-called "participation presumption" means silence is interpreted as consent, placing the onus on

[52] *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (Case C-8/08) [2009] ECR I-4529, paras 59–62.
[53] Opinion of AG Kokott in *T-Mobile Netherlands and Others* (Case C-8/08) EU:C:2009:110, pts 59, 66–72 (capability/uncertainty standard), 73–81, 84–89 (presumptions; standard vs burden of proof), and 96–102, 104–105 (single meeting may suffice; enforcement effectiveness).
[54] *Aalborg Portland A/S and Others v Commission* (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P) [2004] ECR I-123, paras 81–84.

cartel attendants to clearly disassociate or face liability. The later Eturas case (ECJ 2016) – concerning travel agencies who all benefited from a common online platform's cap on discounts – further clarified that companies can rebut the presumption by showing they truly remained independent (for example, if they never received or acted on a collusive communication).[55] However, Eturas also highlighted that even tacit approval (e.g. failure to object to a collusive scheme communicated by a platform) can suffice to find a concerted practice, absent public distancing or timely objection. In essence, by the 2010s the jurisprudence had constructed a holistic set of presumptions: (a) if firms communicate, it is presumed they will align their conduct (the Anic/T-Mobile presumption of effect on the market); and (b) if a firm is present in a collusive context and does not protest, it is presumed to have joined in (the Aalborg presumption of participation). These judicial presumptions greatly aid enforcement by reducing the evidentiary burden on authorities – unless companies produce compelling evidence to the contrary, the very fact of concertation and non-distancing is enough to establish infringement.

During this period, the courts also made clear that liability for concerted practices is not limited to competitors on the same market. Notably, in AC-Treuhand (General Court 2008; ECJ 2015) a consultancy firm that facilitated cartel meetings and data exchanges (but did not produce the cartelized products) was held liable under Article 101.[56] The Court of Justice stressed that Article 101 reaches any undertaking that actively contributes, in full knowledge of the facts, to a collusive outcome – even if that party is not active on the affected market.[57] To hold a facilitator liable, it suffices to show the undertaking intended to contribute to the common plan and was aware (or could reasonably foresee) the other participants' conduct and was prepared to take the risk. AC-Treuhand's "active contribution" (organizing meetings, collecting sales data, mediating disputes) amounted to participation in the overall concerted practice. Importantly, the Court clarified (contrary to the Advocate General's view) that the notions of "agreement" and "concerted practice" are broad and flexible enough to encompass such facilitation.[58]

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[55] *'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba* (Case C-74/14) EU:C:2016:42, paras 39–41, 47, 49–50.
[56] *AC-Treuhand AG v Commission* (Case T-99/04) [2008] ECR II-1501, paras 52–60.
[57] *AC-Treuhand AG v Commission* (Case C-194/14 P) EU:C:2015:717, paras 27, 33–36.
[58] Opinion of AG Wahl in *AC-Treuhand AG v Commission* (Case C-194/14 P) EU:C:2015:350, pts 64–66, 71, 80, 87 (arguing against extending Art 101 to a facilitator not active on the market; proposing annulment).

Another significant case briefly mentioned above is *Eturas* (Case C-74/14, 2016), which dealt directly with concerted practices in an online platform context. In Eturas, a software platform used by multiple travel agencies imposed a uniform cap on customer discounts (via system message and software setting). The question was whether agencies that "stayed silent" and continued using the platform under the new conditions had engaged in a concerted practice. The Court held that if it is proven that the travel agencies were aware of the discount cap announcement, their "failure to object" to it, combined with parallel conduct (not offering higher discounts), could be taken as tacit acquiescence in a concerted practice. In essence, passive participation through a common IT system was deemed equivalent to attending a cartel meeting – the firms were expected to actively distance themselves by, for example, protesting or refusing to comply, to avoid liability.[59] However, the ECJ also underscored the importance of the presumption of innocence (Article 48 of the EU Charter): competition authorities cannot simply assume every user received and agreed to the message absent evidence. The mere dispatch of a message by the platform admin was not enough; there had to be "other objective and consistent indicia" that each company was aware of the collusive initiative. Moreover, companies must be allowed to rebut the presumption of participation by showing, for example, that they never actually saw the message or that they continued to offer higher discounts (i.e. "overrode" the collusive scheme). The Eturas judgment illustrates how EU law adapts the concerted practice concept to new forms of coordination: hub-and-spoke via an IT platform and tacit collusion enforced by software parameters. It emphasizes two points in concerted practice analysis:

(1) knowledge and will – an undertaking cannot be held liable if it genuinely did not know of the common plan; but if it knew and just went along, that's sufficient for a finding; and

(2) the need for evidence or indicia for each alleged participant, to avoid automatic guilt by association.[60]

In summary, the ECJ's case law has gradually expanded and clarified the concept of concerted practice, ensuring it captures informal or novel collusion just as effectively as

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[59] *'Eturas'* (n 55) paras 43–46, 47–49.

[60] Andreas Heinemann and Aleksandra Gebicka, 'Can Computers Form Cartels? About the Need for European Institutions to Revise the Concertation Doctrine in the Information Age' (2016) 7(7) *Journal of European Competition Law & Practice* 431.

formal agreements. From the foundational notion in ICI that firms cannot "swap the risks of competition for cooperation", through to T-Mobile's principle that one meeting can be enough and Eturas's guidance on tacit algorithm mediated collusion, the courts have reinforced a cohesive doctrine: Any coordination that undermines independent competitive behavior is forbidden, regardless of whether it is achieved through face-to-face meetings, public price signaling, or sophisticated software. This robust jurisprudence, together with Commission regulations and guidelines, forms a comprehensive framework that defines and gives practical bite to the prohibition of concerted practices.

3.2 EU Regulatory Framework addressing the Concept of Concerted Practices

The European Union's competition regime has continually evolved to clarify and enforce the prohibition of concerted practices under Article 101 TFEU. A combination of binding regulations, soft law instruments (Commission guidelines), and court jurisprudence has shaped the understanding of what conduct amounts to a concerted practice. In particular, the modernization of enforcement procedures in Regulation 1/2003, the development of block exemption regulations for vertical and horizontal agreements, and interpretative Guidelines on Horizontal and Vertical Restraints have all contributed to delineating the boundary between legitimate cooperation and unlawful collusion. This section examines how the EU's regulatory framework – alongside key ECJ case law – defines and polices concerted practices, the shift to decentralized enforcement and accompanying mechanisms, emerging challenges like algorithmic collusion and hub-and-spoke arrangements (often exacerbated by online platforms).

3.2.1 Modernized Enforcement and Soft-Law Guidance

A foundational change in the EU framework came with Regulation 1/2003[61], which overhauled competition enforcement from 2004. This reform decentralized the application of Article 101, empowering national competition authorities (NCAs) and courts to apply EU competition rules in parallel with the European Commission. The prior system of notifying agreements to the Commission for exemption (under Regulation 17/62) was abolished in favor of self-assessment: agreements that satisfy Article 101(3)'s criteria are deemed lawful without any formal approval. In practice, this "legal exception" system places the onus on

[61] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

companies to ensure their cooperation agreements or practices either do not restrict competition or clearly meet the exemption conditions. The result has been a more efficient and uniform enforcement of Article 101 across the EU, with the Commission and NCAs jointly handling cases through the European Competition Network (ECN). Decentralization significantly increased the detection and prosecution of cartels and concerted practices at national level, while maintaining a consistent legal standard EU-wide. NCAs now regularly investigate domestic cartels (information exchanges, bid-rigging, etc.), applying Article 101(1) directly, which underscores the importance of common interpretative guidance to avoid divergent outcomes.

Soft-law instruments issued by the Commission – notably the Horizontal and Guidelines on vertical restraints – have become crucial in this period of decentralization. These guidelines do not have the force of law but provide authoritative interpretation of how the Commission (and by extension NCAs) will assess certain conduct. Given that undertakings can no longer seek comfort through notification, the Commission's guidance fills the gap by indicating what types of information exchange, coordination, or joint activities are considered benign or problematic. The Commission's Horizontal Guidelines and Guidelines on vertical restraints thus serve as key references for companies and enforcers in determining whether a practice is likely to infringe Article 101(1) as a concerted practice. These soft-law texts distill the principles from decades of case law into practical criteria. For example, the Horizontal Guidelines emphasize the principle that competitors must act independently, "*which precludes any direct or indirect contact… that is likely to influence the commercial strategy of competitors*".[62] They acknowledge that sharing certain information or cooperating in limited ways can be efficiency-enhancing, but stress that contacts which reduce strategic uncertainty among rivals are suspect.[63] In a decentralized system, such guidance promotes a uniform interpretation: NCAs have explicitly been encouraged (through the ECN) to follow the Commission's analytical framework, and divergences are minimized by regular coordination. More detailed the Guidelines will be discussed in sub-section hereof.

[62] Kyriakos Fountoukakos and Susan Black, 'Overview of the EU Commission's Guidance on Information Exchange' (Herbert Smith Freehills Kramer, 21 November 2023) <https://www.hsfkramer.com/insights/2023-11/overview-of-the-eu-commission%E2%80%99s-guidance-on-information-exchange> accessed 15 March 2026.
[63] Ibid.

In sum, Regulation 1/2003's modernization not only empowered more enforcers but also made consistency mechanisms – like soft law guidance and case-law precedents – essential to shaping the concept of concerted practices across the EU.

3.2.2 Block Exemption Regulations: Safe Harbours and Boundaries for Concerted Conduct

Block Exemption Regulations (BERs) form a cornerstone of the EU competition framework by delineating categories of agreements or concerted practices that are exempt from Article 101(1)'s prohibition when certain pro-competitive conditions are met. These regulations provide legal certainty (or "safe harbours") for common types of cooperation, thereby shaping the outer bounds of unlawful concerted behavior. Relevant here are the Vertical Block Exemption Regulation and the Horizontal Block Exemption Regulations for R&D and specialization, all recently updated.[64]

Vertical agreements (between companies at different levels of the supply chain, e.g. a manufacturer and distributor) are generally less likely to involve the kind of collusion Article 101(1) targets, except in certain scenarios. The VBER provides that most vertical arrangements are exempt from Article 101(1) provided that the parties' market shares do not exceed 30% and that the agreement contains no hardcore restrictions.[65] This effectively means that, within those parameters, vertical cooperation is presumed to satisfy Article 101(3) (contributing to efficiency, benefiting consumers, and not eliminating competition). Classic examples include exclusive distribution or franchising agreements that can improve distribution efficiency. However, the VBER carves out and denies exemption to certain restraints in vertical deals that are highly likely to harm competition – notably resale price maintenance (RPM) and territorial or customer restrictions that amount to market partitioning.[66] These "hardcore restrictions" are treated as restrictions by object, akin to horizontal price-fixing cartels, and thus fall outside the safe harbour.[67] For instance, if a supplier and its distributors agree on a fixed minimum price or on exclusive territories with

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[64] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices [2022] OJ L 134/4; Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) TFEU to certain categories of research and development agreements [2023] OJ L 143/9; Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) TFEU to certain categories of specialisation agreements [2023] OJ L 143/20.
[65] Commission Regulation (EU) 2022/720 (n 64) art 3.
[66] Ibid, art 4(a), (b)–(e).
[67] Ibid, recital 16, art 4.

absolute protection, the VBER's shield is lost; the arrangement can then be attacked under Article 101(1) as an illegal concerted practice despite its vertical form. EU case law confirmed this approach early on – e.g. Musique Diffusion française (Pioneer Hi-Fi), where measures to prevent parallel imports were condemned under Article 101.[68]

The VBER and accompanying Guidelines on vertical restraints continue this line, emphasizing that most vertical restraints are assessed on their legal and economic context, but that certain collusive outcomes (including hub-and-spoke information-sharing through a common supplier or platform) can amount to restrictions by object where the exchange removes uncertainty between competitors.[69]

The VBER also reflects modern market realities, especially in e-commerce. It clarifies the treatment of online sales restrictions: a ban that prevents the effective use of the internet (for example, a de facto prohibition on online sales) is a hardcore restriction,[70] whereas restrictions on the use of online marketplaces can fall within the safe harbour provided they do not prevent effective online selling and the market-share thresholds are met (the ECJ's Coty judgment is consistent with this approach).[71] By contrast, certain parity (MFN) clauses are now singled out: "across-platform" (wide) retail parity obligations imposed by online intermediation service providers are *excluded* from the block exemption (Article 5(1)(d) VBER), so they require individual assessment; more limited "narrow" parity (limited to a seller's own website) may still benefit from the safe harbour but is scrutinized and the exemption may be withdrawn in concentrated markets.[72]

These refinements illustrate how the regulatory framework draws the line between acceptable coordination (such as improving distribution or brand image) and concerted practices that unduly limit market access or facilitate collusion in the vertical context.

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[68] *SA Musique Diffusion française* (n. 42).
[69] Commission Notice – Guidelines on vertical restraints [2022] OJ C 248/1; Communication from the Commission – Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements [2023] OJ C 259/1.
[70] *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* (Case C-439/09) EU:C:2011:649; Guidelines on vertical restraints OJ C 248/1, paras 335–336.
[71] *Coty Germany GmbH v Parfümerie Akzente GmbH* (Case C-230/16) EU:C:2017:941; Guidelines on vertical restraints (n 69) paras 332–342.
[72] Commission Regulation (EU) 2022/720 (n 64) art 5(1)(d); Guidelines on vertical restraints (n 69) paras 359–374.

Turning to horizontal cooperation, the EU adopted new Horizontal Block Exemption Regulations (HBERs) in 2023 for two key types of agreements between competitors: research & development (R&D) and specialisation agreements.[73] These HBERs (Regulations 2023/1066 and 2023/1067) recognize that collaboration between competitors can be pro-competitive (for example, by pooling expertise to create new products or rationalizing production for efficiency). Under the R&D BER, agreements to jointly research and develop products or technologies are exempt from Article 101(1) so long as the parties together hold ≤ 25% market share on the relevant product and technology markets (where they are competitors) and comply with conditions that ensure the cooperation truly fosters innovation.[74] Similarly, the Specialization BER exempts agreements whereby firms specialize production (including joint production or one firm ceasing production of certain goods) provided the combined market share is ≤ 20% and no hardcore restrictions (price-fixing, output limitation or market/customer allocation) are present.[75] These market-share thresholds reflect the greater concern that horizontal agreements among larger rivals can more easily tip into collusion; hence the safe harbours are narrower than for verticals (30% under the VBER).

Importantly, if competitors – under the guise of an R&D or specialization pact – engage in conduct that restricts competition by object or by effect (for instance, agreeing prices or sharing markets for existing products), they lose the exemption. The HBERs explicitly list "hardcore restrictions" that disqualify an agreement, mirroring the principle that cartel-like behaviour is incompatible with any claim of pro-competitive purpose.[76] Moreover, even within the block exemptions, any exchange of information must be objectively necessary and proportionate to the alliance's aims; unnecessary sharing of competitively sensitive data (e.g. pricing intentions unrelated to the R&D project) can fall outside the exemption and be assessed as a concerted practice in its own right.[77]

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[73] European Commission, 'Antitrust: Commission adopts new Horizontal Block Exemption Regulations and Horizontal Guidelines' (Press Release IP/23/2990, 31 May 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2990> accessed 15 March 2026.
[74] Horizontal Guidelines (n 69) para 379.
[75] Commission Regulation (EU) 2023/1067 (n 64) art 3(1)–(2), art 5, recital 12–16.
[76] Commission Regulation (EU) 2023/1066 (n 64) art 8(1); Commission Regulation (EU) 2023/1067 (n 64) art 5.
[77] Horizontal Guidelines (n 69) para 152, paras 372, 744–745.

Through these block exemptions, the EU codifies a distinction between benign coordination (exemptible and presumptively lawful) and hardcore concerted practices (unequivocally prohibited). Companies have clarity that, for example, joint R&D is welcome up to a point, but cartel-like conduct (price or output agreements) will never be shielded by a BER.[78] In effect, the framework shapes business behaviour: firms structuring a collaboration know they must stay within the safe-harbour criteria or face Article 101(1) liability. The BERs also work in tandem with Article 101(3)'s case-by-case exemption: even if an arrangement exceeds the BER's market-share limits, it may still be lawful if the parties can prove the four cumulative conditions are met – but the burden lies with them, and the BERs signal what the Commission and courts are likely to accept.[79] Notably, Article 101(3) remains a safety valve: if an otherwise restrictive cooperation "contributes to improving production or distribution… while allowing consumers a fair share of the benefit, without eliminating competition," it can be exempted. In practice, however, satisfying Article 101(3) for concerted practices like price coordination or cartel-type information exchanges is rare, because such restrictions are typically "by object" and very unlikely to meet the conditions of Article 101(3).[80] Thus, the EU's block exemption regime and its strict exclusion of hardcore restraints underscore the core principle: plainly anti-competitive collusion, whether horizontal or vertical, is per se illegal, whereas genuine efficiency-driven cooperation may be allowed but only under defined limits.

3.2.3 Commission Guidelines: Clarifying Concerted Practices and Restraints

The European Commission's Vertical and Horizontal Guidelines serve as interpretative guides that illuminate how the concept of concerted practice is applied in various scenarios. These guidelines, while not binding law, are a key part of the regulatory framework – effectively "soft law" that influences enforcement by the Commission and NCAs and provides compliance advice to undertakings. They play a crucial role in clarifying grey areas: for instance, what kinds of information exchange amount to a prohibited concerted practice, or how far a supplier can impose restrictions without running afoul of Article 101.

[78] European Commission (n 73).
[79] Commission Regulation (EU) 2023/1066 (n 64) recital 17; Commission Regulation (EU) 2023/1067 (n 64) recital 14; Commission Notice – Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) [2004] OJ C 101/97.
[80] Horizontal Guidelines (n 69) para 417; see also para 669.

On the horizontal side, the 2023 Horizontal Guidelines devote significant attention to information exchange between competitors, which is often the linchpin of a concerted practice. The Guidelines affirm the principle that competitors must not reduce strategic uncertainty through direct or indirect contacts.[81] Any exchange of commercially sensitive information (such as prices, costs, output, customers, or future business plans) that is "likely to influence the commercial strategy" of competitors will fall under Article 101(1).[82] In other words, if sharing information makes it easier for firms to coordinate their market conduct – by aligning prices or other competitive parameters – it is treated as a concerted practice. The Guidelines echo the ECJ's formulation from cases like T-Mobile: an information exchange that "reduces uncertainty" about competitors' behavior can itself infringe Article 101(1) by object, even if no formal agreement is reached.[83] Concretely, the Commission states that exchanging current or future pricing or output plans between rivals is almost invariably problematic and can be considered a by-object restriction of competition. Indeed, the Horizontal Guidelines note that a public announcement of future prices intended as a signal to competitors (with no consumer benefit) may constitute a concerted practice by object.[84] By contrast, sharing truly historical or aggregated data that does not reveal individual strategies is less likely to infringe – reflecting the idea that some exchanges have benign motivations or effects. The Guidelines list factors such as the age of information, level of aggregation, frequency of exchange, and market characteristics to assess whether an exchange is likely to facilitate collusion.[85] They explicitly warn that even a one-off exchange of sensitive information can trigger Article 101, "depending on the structure of the market," thereby citing T-Mobile as precedent that a single meeting can suffice for a concerted practice.

The Horizontal Guidelines also illuminate indirect information exchanges and hub-and-spoke scenarios, aligning with case law developments. They clarify that Article 101(1) can be violated not only by direct competitor-to competitor contacts, but also by indirect exchanges "through a third party such as a trade association, a common supplier or buyer,

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[81] Ibid, paras 6.2.2–6.2.3.
[82] Ibid, paras 741–745, 760–764.
[83] *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (Case C-8/08) EU:C:2009:343, paras 29–31, 41, 51, 59–62; Horizontal Guidelines (n 69) para 719.
[84] Ibid, paras 842–849.
[85] Ibid, paras 768–770, 776–784, 816–817.

or a shared platform or algorithm".[86] If, for example, competing manufacturers each disclose their future pricing plans to a common distributor (even unwittingly), and the distributor then communicates those plans among them, this hub-and-spoke arrangement can amount to a concerted practice among the competitors. The Guidelines specify that a case-by-case analysis will consider each participant's awareness and role, but firmly state that using an intermediary does not shield companies from Article 101 – the classic maxim that "what you cannot do directly, you cannot do indirectly".[87] Notably, an online platform can act as the "hub" for collusion between business users, a recognition of modern digital cartels (as in the Eturas case discussed below). Likewise, if competitors share a common algorithm that automatically coordinates their pricing (a sort of IT-facilitator), that too is treated as an indirect information exchange potentially caught by Article 101.[88] By addressing these scenarios, the Commission's guidance makes clear that companies cannot circumvent the cartel rules by using algorithms or intermediaries to do the coordinating on their behalf.[89]

Another important clarification in the Horizontal Guidelines concerns the unilateral disclosure of information. The Commission notes that even if one company merely gives sensitive information to a competitor who "accepts" it, this can be sufficient to establish a concerted practice – there is no need for a formal agreement or mutual exchange. In such cases, a rebuttable presumption arises that the receiving competitor will use the information to adjust its conduct (an incorporation of the rule from Anic and Hüls). To avoid liability, the onus is on the recipient to "take active steps" demonstrating it did not wish to partake in any coordination – for example, by immediately rejecting the information or reporting it.[90] This aligns with EU case law requiring companies to publicly distance themselves if they find themselves in a cartel meeting or exchange (failure to do so implies acquiescence).[91]

The European Commission's Guidelines on vertical restraints (Commission Notice 2022/C 248/01) provide a comprehensive framework for interpreting vertical agreements and concerted practices under Article 101 TFEU in light of the Vertical Block Exemption

[86] Ibid, para 401.
[87] Fountoukakos and Black (n 62).
[88] *'Eturas'* (n 55); Horizontal Guidelines (n 69) paras 397, 401–02.
[89] OECD, 'Hub-and-spoke arrangements – Note by the European Union' (DAF/COMP/WD(2019)89, 4 December 2019) 5–7 <https://one.oecd.org/document/DAF/COMP/WD(2019)89/en/pdf> accessed 15 March 2026.
[90] Fountoukakos and Black (n 62).
[91] *Aalborg Portland A/S and Others v Commission* (n 54).

Regulation. These Guidelines, which replace the 2010 version, reflect enforcement experience and case-law developments – especially the rise of e-commerce and online platforms – and, like the Horizontal Guidelines, aim to give stakeholders “simpler, clearer and up-to-date rules” for self-assessment. They highlight changes and priorities around dual distribution, online sales restrictions, resale price maintenance (RPM), territorial/customer restraints, “most-favoured-nation” (parity) clauses, and hub-and-spoke scenarios, marking the boundary between permissible vertical cooperation and unlawful concerted practices under Article 101.

The Guidelines reiterate that vertical agreements (between different levels of the supply chain) fall under Article 101(1) where they restrict competition by object or effect and affect trade between Member States, while acknowledging that many verticals may be efficiency-enhancing. Hence the stepwise analysis: first, check if the agreement sits in the VBER safe harbour; failing that, assess whether it contains a restriction by object (typically the hardcore list), or otherwise examine effects and possible justification under Article 101(3). Under Article 2(1) VBER, vertical agreements are block-exempt to the extent they contain vertical restraints, provided the market-share cap of 30% in Article 3 is met. If within that safe harbour and free of hardcore restrictions (Article 4) – notably RPM and certain territorial/customer bans, including preventing the effective use of the internet – the agreement is presumed lawful without an individual effects analysis. By contrast, hardcore restraints are ordinarily treated as by-object infringements (so effects need not be proved), per the Court’s case law. Only in exceptional circumstances might such a restraint be objectively necessary and fall outside Article 101(1). For non-hardcore vertical restraints (e.g., exclusive dealing, non-competes under five years, selective distribution criteria), a rule-of-reason assessment weighs market impact and efficiencies.[92] Even agreements benefiting from the safe harbour may lose it: the Commission or an NCA can withdraw the block exemption in individual cases (Article 6 VBER) or for parallel networks covering >50% of a market (Article 7), which the Guidelines also explain.[93]

The Guidelines on vertical restraints deepen analysis for today’s economy. They tolerate exchanges directly related to implementing the vertical agreement and necessary to

[92] Guidelines on vertical restraints (n 69) para 423.
[93] Commission Regulation (EU) 2022/720 (n 64) art 6–7.

improve production/distribution are covered, otherwise the VBER does not apply.[94] Practices such as RPM, absolute territorial protection, and hub-and-spoke collusion remain squarely on the forbidden side (usually as by-object restrictions); by contrast, exclusive/selective distribution, franchising and genuine agency typically proceed safely within VBER limits. While not legally binding, the Guidelines are persuasive and frequently cited; the ECJ has confirmed that Commission notices guide but do not bind national authorities and courts.[95] Overall, the Commission's guidelines operate hand-in-hand with case law: they distill judicial doctrines into concrete guidance (often citing the actual cases in footnotes), and at times even expand on future-oriented concerns (like algorithmic collusion) that courts have yet to fully address. While not legally binding, these guidelines are regularly cited by the ECJ as a point of reference and are treated as authoritative by NCAs, thus significantly shaping the practical understanding of concerted practices throughout the EU.

3.3 Specific Issues in Distribution Networks

Distribution networks – the chains of manufacturers, distributors, and retailers through which goods and services reach consumers – face a host of operational and competitive challenges that intersect with competition law. While the archetype of a concerted practice is often a secret horizontal cartel among competitors, the concept also crucially applies to distribution networks and other vertical arrangements. Distribution agreements – for example, between a manufacturer and its distributors or franchisees – can facilitate collusion or impose anti-competitive restraints, blurring the line between vertical and horizontal conduct.

The most common issues the EU grapples with are disintermediation, multi-channel distribution, technological gaps, global supply complexities, and inconsistent data reporting. These challenges can heighten the risk of vertical restraints (coordination between supplier and distributor) and horizontal collusion (coordination among competitors) in distribution networks, potentially violating competition laws if not properly addressed. EU competition law frameworks – notably the Vertical Block Exemption Regulation and Horizontal Block

[94] Guidelines on vertical restraints (n 69) paras 208–211; Commission Regulation (EU) 2022/720 (n 64) recital 13 and art 2(5).
[95] *Expedia Inc v Autorité de la concurrence and Others* (Case C-226/11) EU:C:2012:795.

Exemption Regulations – and their accompanying Guidelines provide the legal benchmarks for assessing such practices in the EU alongside sector-specific guidance.

3.3.1 Resale Price Maintenance

Modern distribution networks operate in a rapidly evolving environment that can inadvertently incentivize anticompetitive coordination. One major trend is disintermediation – suppliers bypassing traditional distributors by selling directly (especially via e commerce). This reduces distributors' relevance and can tempt remaining intermediaries to engage in restrictive practices (for example, agreeing with suppliers on fixed resale prices or exclusive territories) to secure margins and market position. Resale Price Maintenance (RPM) – fixing minimum resale prices – is a clear by-object infringement of Article 101(1) TFEU and deemed a hardcore restriction under VBER Article 4(a).[96] For instance, the Yves Saint Laurent Parfums case underscored that RPM agreements are illegal unless they satisfy the strict exemption criteria of Article 101(3) (which is rare in practice).[97] Distributors facing disintermediation pressure might tacitly coordinate with suppliers to impose RPM or territorial sales bans to protect their margins, but such conduct would almost certainly violate Article 101(1) unless exempted. In the EU, any vertical agreement fixing resale prices is presumptively unlawful, and even indirect pressures on distributors to maintain certain prices count as RPM. The European Commission reaffirmed this stance in 2018 by fining four electronics manufacturers (Asus, Denon & Marantz, Philips, and Pioneer) a total of €111 million for imposing fixed or minimum resale prices on online retailers. In a Case AT.40465 - ASUS the Commission found two *single and continuous* infringements in Germany (3 Mar 2011–27 Jun 2014) and France (7 Apr 2013–15 Dec 2014) where Asus restricted retailers' ability to set their own resale prices. Asus monitored online prices via price-comparison sites and internal tools, identified undercutting retailers, then contacted them to raise prices to (or toward) the recommended resale price (RRP); repeat non-compliers were threatened or sanctioned. Complaints from other retailers also triggered interventions. The Commission qualified this conduct as agreements and/or concerted practices between Asus and multiple retailers as such that by its very nature, restricts

[96] Commission Regulation (EU) 2022/720 (n 64) art 4(a).
[97] *Groupement d'achat Édouard Leclerc v Commission (Yves Saint Laurent Parfums)* (Case T-19/92) [1996] ECR II-1851.

competition within the meaning of Article 101(1) of the Treaty.[98] In case Pioneer was additionally fined for limiting cross-border sales to sustain price differences between Member States – reinforcing that RPM coupled with territorial isolation is a particularly egregious violation.[99]

3.3.2 Market Dividing

Dividing markets along geographic or customer lines is another focus of competition law, as it strikes at the heart of the EU's single market. Absolute territorial protection – agreements that prevent distributors from selling outside an allotted territory or to certain customer groups – is classified as a hardcore restriction in VBER Article 4(b–c) and treated as a by-object violation of Article 101.[100] The 2022 Guidelines reinforce that restricting "passive" sales (responding to unsolicited orders from outside one's territory) is especially problematic: any clause that "prevent[s] buyers or their customers from effectively using the Internet to reach customers in other markets" is presumptively unlawful. This is consistent with landmark cases like Consten & Grundig (1966), where an exclusive distributorship that entirely barred parallel imports was found to infringe Article 101.[101] In Case AT.39610 – Power Cables, the Commission found a single and continuous infringement built on concerted practices reflecting a "home-territory" protection principle and the allocation of export markets. Conduct can fall within Article 101(1) TFEU as a concerted practice even without an explicit common plan where undertakings – aware of each other's intentions – knowingly adopt or adhere to collusive mechanisms that facilitate the coordination of their commercial behaviour. Likewise, negotiations and preparatory contacts that culminate in an

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[98] European Commission, Commission Decision of 24 July 2018 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40465 – Asus) para 109 <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40465/40465_337_3.pdf> accessed 15 March 2026.

[99] European Commission, 'Antitrust: Commission fines four consumer electronics manufacturers for resale price fixing' (Press Release IP/18/4601, 24 July 2018) <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_18_4601/IP_18_4601_EN.pdf> accessed 15 March 2026.

[100] Commission Regulation (EU) 2022/720 (n 64) art 4(b)–(c); Guidelines on vertical restraints (n 69) paras 5–6, 223–232.

[101] *Établissements Consten Sàrl and Grundig-Verkaufs-GmbH v Commission* (Joined Cases 56 and 58/64) [1966] ECR 299; Opinion of AG Roemer in *Établissements Consten Sàrl and Grundig-Verkaufs-GmbH v Commission* (Joined Cases 56 and 58/64) EU:C:1966:19.

overarching scheme to regulate the market may themselves, depending on the circumstances, constitute a concerted practice.[102]

The Commission's enforcement action against Guess (2018) exemplifies the types of vertical restraints deemed hardcore: Guess was fined €39.8 million for contractual clauses that barred its authorized retailers from advertising online (including using the Guess brand names for Google Ads), from selling to customers outside their allocated territories, from cross-selling to other authorized retailers, and from independently deciding prices. These practices – preventing out-of-territory e-commerce and partitioning national markets – were found to "significantly restrict competition" and had no credible efficiencies, thus infringing Article 101(1).[103] The Guess case underscores the Commission's resolve to maintain an open single market: any vertical agreement that segregates EU markets by territory or customer (without a clear pro-competitive justification) will be viewed as an unlawful restriction by object. The 2022 Guidelines incorporate this principle and explicitly reference the Geo-Blocking Regulation as part of the broader digital single market strategy aimed at eliminating unjustified barriers to cross-border online trade.[104]

That said, the Guidelines also describe acceptable scope for territorial restraints, such as limiting active sales into an exclusive territory (permitted under Article 4(b) VBER in specified cases) or restricting sales to unauthorized dealers to protect a selective distribution network (now permitted more broadly, as noted above). These are seen as ancillary restraints that can improve inter-brand competition or distribution efficiency, and thus fall on the lawful side of the line provided they meet the VBER conditions.[105] In summary, the Guidelines draw a clear line: vertical agreements may allocate territories or customer groups to distributors to foster investment, but they cannot eliminate intra-brand competition

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[102] European Commission, Commission Decision of 2 April 2014 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39610 – Power Cables) para 478 <https://ec.europa.eu/competition/antitrust/cases/dec_docs/39610/39610_9899_5.pdf> accessed 15 March 2026.

[103] European Commission, Commission Decision C(2018) 8455 final of 17 December 2018 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40428 – Guess) (summary in [2019] OJ C 47/4) <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40428/40428_1205_3.pdf> accessed 15 March 2026; European Commission, 'Antitrust: Guess fined for blocking cross-border sales' (Press Release IP/18/6844, 17 December 2018) <https://europa.eu/rapid/press-release_IP-18-6844_en.htm> accessed 15 March 2026.

[104] EUR-Lex, 'Geo-Blocking: a new Regulation enters into force' <https://eur-lex.europa.eu/content/news/geo-blocking-regulation-enters-into-force.html> accessed 15 March 2026.

[105] Commission Regulation (EU) 2022/720 (n 64) art 4(b)–(d); Guidelines on vertical restraints (n 69) paras 224–226, 241–244.

entirely or isolate national markets. Whenever a vertical clause approaches the latter outcome – e.g. absolute bans on "out-of-territory" passive sales – it becomes a likely restriction by object.

The proliferation of multi-channel sales (physical retail, own websites, third-party online marketplaces, etc.) presents another challenge. Distributors must adapt to digital sales channels without breaching competition rules. Managing multiple channels can increase the temptation to impose vertical restraints like online sales bans or "most-favored-nation" parity clauses to control distribution. Indeed, outright bans on internet selling are considered hardcore restrictions under EU law: in Pierre Fabre (2011), the Court of Justice condemned a supplier's de facto prohibition on all online sales as a by-object infringement not justified by protecting brand image.[106] The Commission's Guidelines on vertical restraints likewise state that any clause preventing buyers or their customers from effectively using the internet to reach customers is presumptively unlawful. Thus, a supplier cannot, for example, blanketly ban its distributors from selling via online marketplaces or from using price-comparison websites – such broad online restraints "prevent the effective use of the internet" and are treated as serious infringements by object.[107] More limited online restrictions may be permissible (for instance, requiring certain quality standards for a distributor's website), but only if they are genuinely aimed at quality or brand protection and do not amount to an outright channel ban. The new EU rules have also relaxed the prior "equivalence principle" – suppliers in a selective distribution system no longer need to impose criteria for online sales that are equivalent to their offline criteria, recognizing that the online channel has different characteristics. They are free to set different qualitative conditions online (e.g. specific website requirements) than offline, so long as those conditions are not a covert means of discouraging internet sales.

3.3.3 "Hub-and-Spoke" Collusion and Algorithms.

Increased competitive pressures and evolving consumer demands in the digital age have complicated distribution networks and, in some cases, spurred collusive behavior. Online marketplaces like Amazon have conditioned customers to expect rapid delivery and

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[106] *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* (Case C-439/09) EU:C:2011:649, para 47.
[107] Guidelines on vertical restraints (n 69), paras 206–211; Commission Regulation (EU) 2022/720 (n 64) art 4(e).

low prices, pressuring distributors to streamline operations or risk losing business. This environment can encourage covert coordination: for example, rival distributors might use a common supplier or platform to indirectly coordinate prices or output – a classic hub-and-spoke arrangement. In a typical hub-and-spoke scenario, a central hub (often an upstream supplier or a platform intermediary) facilitates information exchange between competing spokes (e.g. downstream retailers), enabling horizontal collusion without direct contact among the competitors. Such indirect horizontal coordination is just as unlawful under Article 101(1) TFEU as a direct cartel. EU case law confirms that even a single exchange of sensitive future pricing information among competitors can suffice to establish a concerted practice "by object", since it removes strategic uncertainty about their conduct.[108] As mentioned previously in the T-Mobile Netherlands case, the Court of Justice held that an information exchange capable of reducing uncertainty about competitors' future behavior violates Article 101(1) by object. Likewise, the UK "toys and games" cartel (Argos & Littlewoods v OFT) demonstrated a hub-and spoke conspiracy in practice: there, a supplier (Hasbro) acted as the hub by conveying pricing intentions to competing retailers (Argos and Littlewoods, the spokes), an unlawful price-fixing arrangement ultimately upheld by the Court of Appeal in 2006.[109]

European Commission guidelines also underscore the illegality of such indirect collusion. The EU's Horizontal Guidelines caution that any horizontal coordination achieved through a common supplier or distributor will normally infringe Article 101(1) unless it clearly meets the pro-competitive criteria of Article 101(3) TFEU.[110] In practice, few justifications exist for this kind of coordination – only genuinely efficiency-enhancing collaborations (for example, a joint distribution venture ancillary to a broader integration between the firms) might survive scrutiny, and even then only if narrowly tailored to generate pro-competitive benefits. Firms in the EU are expected to compete vigorously on price and quality; if instead they coordinate through a shared intermediary, competition enforcers are likely to intervene.

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[108] *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (Case C-8/08) [2009] ECR I-4529, paras 31, 51–53, 61–62.
[109] *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2006] EWCA Civ 1318.
[110] Horizontal Guidelines (n 69).

A recurring theme in the European Commission's 2022 guidance is vigilance against indirect horizontal collusion that may be facilitated via vertical relationships or modern technology. Legitimate vertical cooperation (e.g. manufacturer–distributor relationships) must not serve as a "backdoor" for a cartel among the distributors.[111] In other words, companies cannot escape Article 101 liability by coordinating through an intermediary – be it a common supplier, a trade association, or even an algorithm. The Court of Justice's jurisprudence (for example, in ANIC) makes clear that the concept of a concerted practice is broad, capturing "any form of coordination that knowingly substitutes practical cooperation for the risks of competition" even without a formal agreement. Thus, if competing distributors use a common manufacturer or platform as a conduit to share sensitive information or align their market conduct, it can be condemned as a concerted practice by object, just as if they had struck a direct agreement among themselves. Applying Article 101 in these situations, especially where no explicit agreement exists, raises challenging questions that legal scholars have begun to explore.

Modern examples illustrate how a hub-and-spoke mechanism can operate through algorithms or digital platforms. A notable case is Eturas, where multiple travel agencies all used a common online booking software platform. The platform's operator (acting as the hub) imposed a uniform cap on customer discounts for all participating agencies. Even though the agencies (the spokes) never communicated directly, the Court of Justice found that by tacitly accepting the platform's restriction (failing to object to it), the agencies had engaged in a concerted practice.[112] In essence, the software platform facilitated a horizontal price-fixing arrangement – a hub-and-spoke collusion with the algorithm provider at the center. In response to such risks, the European Commission's Guidelines on vertical restraints explicitly warn that firms "cannot circumvent the rules by using algorithms or intermediaries" to coordinate on prices or other competitively sensitive terms. The rise of pricing algorithms and digital monitoring tools means that parallel conduct can increasingly be achieved without explicit human contact. For example, competitors might all adopt the same pricing software, which then automatically aligns their prices – precisely the scenario that emerged (at least in part) in Eturas. Indeed, recent research suggests that advanced

[111] Burton Ong, 'The Applicability of Art 101 TFEU to Horizontal Algorithmic Pricing Practices: Two Conceptual Frontiers' (2021) 52(2) *IIC – International Review of Intellectual Property and Competition Law* 189-211.
[112] *'Eturas'* (n 55) paras 39–41, 47.

pricing algorithms are capable of learning collusive strategies autonomously. Calvano et al. (2020) showed in an experimental oligopoly model that self-learning AI algorithms consistently converged on supracompetitive prices without any direct communication between firms, sustaining high prices through tacitly collusive strategies (with programmed punishment phases for deviation).[113] On the other hand, not all algorithmic tools uniformly boost collusion: a game-theoretic analysis by Miklós-Thal and Tucker (2019) indicates that better demand forecasting via AI can, in some cases, destabilize collusion by increasing each firm's temptation to undercut prices when high demand is predicted, potentially leading to lower prices and higher consumer welfare.[114] Nevertheless, many experts caution that algorithm-driven tacit collusion remains a very real threat in online markets. Ezrachi and Stucke (2020), for example, warn that algorithms could enable "sustainable and unchallenged" collusion – leading to higher prices and consumer harm while escaping detection under current legal frameworks.[115] Some commentators have even urged enforcers to "keep calm" in the face of algorithmic pricing, suggesting such tacit collusion may be unlikely or self-correcting.[116] Emerging evidence and enforcement trends, however, point to the contrary: algorithmic parallel pricing can occur and may not always self-erode, especially if algorithms swiftly punish deviations and thereby maintain a collusive equilibrium.

Competition authorities are accordingly on high alert for collusion facilitated by algorithms or other indirect means. In its E-commerce Sector Inquiry (2017), the European Commission found that price-monitoring software had become widely used by retailers and noted that increased online price transparency – amplified by such software – "may facilitate or strengthen (both tacit and explicit) collusion between retailers" by making detection of any cheating instantaneous.[117] The inquiry reported that about two-thirds of online retailers tracked competitors' prices, and many used automatic software tools to adjust prices in real

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[113] Emilio Calvano and others, 'Artificial Intelligence, Algorithmic Pricing, and Collusion' (2020) 110(10) *American Economic Review* 3267.
[114] Jeanine Miklós-Thal and Catherine E Tucker, 'Collusion by Algorithm: Does Better Demand Prediction Facilitate Coordination Between Sellers?' (2019) 65(4) *Management Science* 1552.
[115] Ariel Ezrachi and Maurice E. Stucke (2020), "Sustainable and Unchallenged Algorithmic Tacit Collusion," Northwestern Journal of Technology and Intellectual Property 17(2): 217–274.
[116] Ibid.
[117] European Commission, *Final Report on the E-Commerce Sector Inquiry* COM(2017) 229 final (10 May 2017) <https://competition-policy.ec.europa.eu/system/files/2021-10/2017_ecommerce_SI_final_report_en.pdf> accessed 15 March 2026.

time, potentially reducing strategic uncertainty and stabilizing parallel conduct.[118] Following that inquiry, the Commission pursued enforcement actions in sectors such as consumer electronics and online retail fashion, where it found that manufacturers and distributors had used pricing algorithms or platform restrictions to keep prices artificially high or to partition markets. These cases (e.g. fines against several electronics makers in 2018 for algorithm-assisted resale price maintenance) underscore a clear message: a vertical agreement or arrangement will not immunize what is essentially horizontal collusion. In EU law, an ostensibly vertical practice that serves to coordinate competing firms is treated as a horizontal infringement. For instance, if a supplier "orchestrates" its independent distributors to all maintain elevated prices – going beyond merely announcing a recommended price and actually ensuring compliance – that arrangement is a cartel by another name. Similarly, if a dual-distribution scenario (where a supplier sells both directly and through retailers) results in the supplier and its retailers sharing future pricing plans or other competitively sensitive strategies, thereby reaching a meeting of minds on market conduct, an Article 101 violation has occurred. Even without an explicit cartel agreement, a pattern of information exchange or consciously aligned behavior can be enough to establish an unlawful concerted practice. EU and UK competition authorities have repeatedly emphasized that firms cannot avoid liability by structuring a cartel as a series of vertical interactions. In the Argos/Hasbro case, for example, what superficially looked like separate manufacturer-to-retailer agreements was unmasked as a single horizontal conspiracy among retailers, mediated by the supplier-hub.[119] In line with this approach, the Commission's guidance advises businesses to consult the horizontal antitrust rules whenever a vertical arrangement could produce collusive effects among competitors. In practical terms, companies should avoid any arrangement that significantly reduces strategic uncertainty in the market – that reduction of uncertainty is the hallmark of impermissible coordination.

3.4 Concluding Remarks

The evolution of the concept of concerted practices under EU competition law reflects a progressive broadening of Article 101 TFEU's reach to capture ever more subtle forms of collusion, both horizontal and vertical. Drawing from a half-century of Court of Justice jurisprudence, it is clear that a concerted practice need not be embodied in a formal

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[118] Ibid.
[119] Richard Whish, 'Hub-and-Spoke Concerted Practices' (2018) 36 *Revista de Concorrência e Regulação* 201.

agreement; any form of coordination by which companies "knowingly substitute practical cooperation for the risks of competition" suffices to infringe Article 101(1). This definition, first articulated in ICI v Commission (Dyestuffs), established that even absent a written contract, collusive conduct can be caught if firms deliberately coordinate instead of competing independently.[120] Early cases like Suiker Unie reinforced the principle that each market operator must determine its conduct independently – "any direct or indirect contact" between competitors that influences a rival's market behavior or reveals future intentions is strictly forbidden. In other words, from the outset EU law has condemned the mere process of coordination (the "concertation") as the violation, treating it as unlawful by object when its nature is to undermine uncertainty between competitors.[121]

Importantly, EU law on concerted practices has evolved not only in the horizontal (competitor-to-competitor) context but also to address vertical and hybrid arrangements within distribution networks. While early Article 101 cases like Consten & Grundig dealt with classic vertical restraints (exclusive distribution agreements) as agreements "by object" restricting competition, the concept of concerted practice was soon applied to less overt forms of vertical coordination. In Musique Diffusion Française (Pioneer), the Court scrutinized a supplier's coordination of an EU-wide distribution network – allocating territories and orchestrating distributor conduct.[122] The judgment signalled that a firm in a central position (a manufacturer or wholesaler) can facilitate a concerted practice among its downstream distributors, for example by serving as a hub for the exchange of sensitive information or by inducing parallel restraints across the network. This was an early recognition of "hub-and-spoke" collusion in EU law: even if distributors never meet each other, a supplier that channels or coordinates their anti-competitive conduct can render the whole arrangement a concerted practice in violation of Article 101.[123] Likewise, the Court's judgment in AC Treuhand (2015) confirmed that third-party facilitators of collusion are not beyond Article 101's reach. AC Treuhand, a consultancy that organized cartel meetings and safeguarded secrets for a vitamins cartel, was held liable for participating in a concerted

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[120] *Imperial Chemical Industries* (n 38) paras 619, 664–65.
[121] *Suiker Unie* (n 40) paras 173–74.
[122] *SA Musique Diffusion française* (n. 42) paras 106–109.
[123] *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2006] EWCA Civ 1318. Two rival retailers (Argos and Littlewoods) received future pricing information via their common supplier (Hasbro). The Court of Appeal held that the indirect exchange was, in substance, no different from an express horizontal price-fixing agreement and constituted a concerted practice.

practice despite not competing in the affected market. The clear message is that liability under Article101 extends to any party who knowingly contributes to a collusive coordination, underscoring the functional breadth of "concerted practice" as a catch-all for collusion irrespective of formal role or vertical/horizontal classification. In distribution networks, this means a supplier cannot escape responsibility by claiming to be "vertical" or an outsider if in reality it is the linchpin enabling horizontal coordination among distributors. EU enforcement has consistently attacked such scenarios: e.g. vertical price-fixing (resale price maintenance), whereby a manufacturer and its retailers collectively maintain supra-competitive prices, is treated as a concerted practice and agreement by object essentially a cartel in vertical guise. Territorial market allocation orchestrated through distribution contracts is another example: a supplier imposing absolute territorial exclusivity (barring parallel imports or out-of-area sales) colludes with each distributor to partition markets, an illicit concerted practice as found in Consten & Grundig and many subsequent cases. In short, the form of coordination (horizontal cartel, vertical restraint, or hybrid scheme) is immaterial – what matters is the substance: if undertakings knowingly coordinate to restrict competition, Article 101 will apply. The doctrine of concerted practices has proven flexible enough to encompass these vertical and network-based infringements, ensuring that distribution systems do not become a safe harbour for collusion.

From a policy perspective, the EU's treatment of concerted practices reveals a strong commitment to deterrence and a recognition that antitrust enforcement must continually adapt to new collusive strategies. The modernization of enforcement in 2004 (Regulation 1/2003) reinforced this commitment by decentralizing Article 101 enforcement to national competition authorities and courts and abolishing the prior notification system. Businesses now self-assess the legality of their cooperation agreements, with Regulation 1/2003 making clear that restrictions of competition are prohibited unless exempted under Article101(3) or a block exemption. This shift, coupled with the advent of corporate leniency programs, sharpened the focus on uncovering and punishing secret cartels and concerted practices. It also elevated the importance of Commission-issued guidelines and Block Exemption Regulations (BERs) in clarifying the grey zones between lawful cooperation and unlawful concertation. For vertical distribution arrangements, the Vertical Block Exemption Regulation provides a safe harbour for many vertical agreements, on the condition that certain "hardcore" collusive restraints (like fixing resale prices or dividing markets) are not present. The Guidelines on vertical restraints explicitly list which information exchanges or restraints in a distribution relationship are generally permissible and which are likely problematic, particularly in dual distribution settings where a supplier also competes with its distributors. For horizontal collaborations, the Commission's Horizontal Guidelines devote considerable attention to information exchanges and the risk of collusion, codifying the lessons of cases like T-Mobile and Eturas. They warn that sharing future pricing or output plans is almost invariably an infringement by object and clarify that even indirect exchanges (through a third-party or platform) are caught if they serve to reduce strategic uncertainty among competitors. Notably, the 2023 Horizontal Guidelines illustrate "hub-and-spoke" scenarios – for instance, competing retailers coordinating via a common manufacturer or via a shared algorithm – and affirm that the competitors and the facilitating intermediary may all be held liable for the resulting concerted practice.[124] Similarly, the Guidelines on vertical restraints underscore that firms "cannot circumvent the rules by using intermediaries or algorithms" to coordinate on sensitive terms. The EU's latest regulatory instruments thus reflect an acute awareness of evolving business models: the rise of online platforms and digital distribution models prompted new rules removing the block exemption for hybrid platform agreements (e.g. Amazon's marketplace terms) and limiting it for situations where information sharing goes beyond what's necessary for the vertical agreement[125]. In sum, contemporary enforcement policy seeks to maintain a balance whereby genuinely benign forms of cooperation (often protected by block exemptions or justified under 101(3)) are allowed, but any covert coordination – no matter how novel the medium – is identified and prosecuted under Article101. The Commission's 2017 E-commerce Sector Inquiry, for example, revealed extensive use of price-monitoring algorithms in online retail and warned that such tools can "facilitate or strengthen…collusion" by instantaneously aligning prices. The enforcement follow-up (fines on electronics firms for algorithm-aided RPM, action against online sales restrictions, etc.) shows the authorities' resolve to tackle collusion in

[124] Horizontal Guidelines (n 69) para 402 (noting that hub-and-spoke collusion is caught by art 101(1) TFEU and that both the hub and the spokes may be held liable).

[125] Commission Regulation (EU) 2022/720 (n 64) art 2(6) (categorically excludes "hybrid" online intermediaries from the block exemption. A hybrid platform – one that sells in competition with the businesses it intermediates (e.g. a marketplace operator with own-products) – must have its agreements (with sellers) assessed under Article 101 without the benefit of the safe harbour. This reflects EU concerns (also addressed by the Digital Markets Act, Regulation (EU) 2022/1925) that such platforms could misuse their role to engage in anti-competitive self-preferencing or collusion).

digital markets by applying the concerted practice doctrine even in complex, tech-mediated contexts.[126]

Despite the broadened arsenal for enforcement, challenges remain on the frontier of algorithmic collusion and digital-platform-facilitated coordination. The concerted practices doctrine, as shaped largely in the era of human decision-making, is now being tested by scenarios in which artificial intelligence and pricing algorithms may enable tacitly collusive outcomes without traditional communication. EU law still requires some form of "meeting of minds" – however minimal – to establish a concerted practice, and pure "conscious parallelism" (mere uncoordinated adoption of the same strategy) is not in itself unlawful. This means that if competing firms independently deploy self-learning algorithms that happen to align prices (what scholars term "algorithmic tacit collusion"), it may fall outside Article 101's reach absent proof of some prior coordination or facilitating practice.[127] Eturas illustrates both the possibilities and limits of the current doctrine in digital settings: there, a common software platform's unilateral imposition of a uniform pricing restriction was deemed a concerted practice once the travel agencies were found to have knowingly tolerated it. The Court inferred the requisite "meeting of minds" from the participants' passive acceptance of the algorithmic limit. But where collusion is purely emergent from parallel algorithmic learning – with no hub, no signal, and no human contact – enforcement faces a vexing gap. Scholars have pointed out that the conceptual toolkit of Dyestuffs and Suiker Unie may be ill-suited to the age of digital collusion, calling for a re-examination of the concertation doctrine. Some propose that new presumptions or regulations might be needed if algorithms autonomously attain stable high-price equilibria. The EU's policy response is still evolving. The 2023 Horizontal Guidelines stress that firms remain fully liable for pricing outcomes "determined by algorithms" – an algorithm is merely an extension of the firm's will, like an employee, so its collusive behavior can implicate the firm. Moreover, when competitors share a pricing algorithm or optimization tool, that alone may constitute a forbidden information exchange if it aggregates sensitive data or effectively aligns their strategies. In practice, competition authorities are closely monitoring markets prone to algorithmic coordination (online retail, dynamic pricing industries) and have not ruled out

[126] E-commerce Sector Inquiry Final Report (n 117) (finding that approximately 67% of surveyed retailers used automatic software to track competitors' prices and noting that increased online transparency can 'facilitate collusion' by making deviations easier to detect).
[127] Heinemann and Gebicka (n 60) 433.

creative enforcement using existing law. In parallel, regulatory initiatives such as the Digital Markets Act (DMA) and data-sharing regulations aim to curb the structures that could facilitate tacit collusion (for example, the DMA targets certain self-preferencing and data usage by dominant platforms that might indirectly suppress competition). All told, while algorithmic tacit collusion currently presents a conceptual and evidentiary challenge, the trajectory of EU competition law suggests that the fundamental tenet – prohibiting any form of cooperation that replaces independent rivalry with coordinated action – will guide future adaptations of the concerted practice doctrine. Whether through case-law evolution or targeted legislation, the EU is poised to ensure that new technologies do not become a loophole for cartels.[128]

The concept of concerted practices in light of European competition law has been refined by progress so that Article101 remains effective under ever-changing economic conditions. The ECJ's jurisprudence – from Dyestuffs and Suiker to Anic, T-Mobile, Eturas, and beyond – demonstrates an enduring commitment to substance over form: what matters is that firms, by choice, ceased to act independently and coordinated their behavior. That simple insight has been elaborated into a robust doctrine that captures blatant cartels and more elusive collusive tendencies alike. The legal tests have evolved (introducing useful presumptions and clarifying that even tacit or one-off coordination suffices), but they remain rooted in the fundamental aim of Article 101: to "strictly preclude" business conduct that subverts the competitive process. On the enforcement side, the EU has complemented judicial developments with a comprehensive policy toolkit – including Regulation 1/2003's flexible procedural framework, Block Exemption Regulations delineating safe harbours for pro-competitive agreements, and detailed Guidelines (2022–2023) that translate case-law into practical compliance standards. These instruments reflect a nuanced approach: they recognize that not all cooperation is harmful (indeed, some is efficiency-enhancing and allowed under Article 101(3)), yet they draw bright lines around the most pernicious forms of coordination (e.g. price-fixing, market-sharing, output limitation or the exchange of future

[128] Margrethe Vestager, 'Margrethe Vestager (European Commission): Confidence in EU competition law for competitive, fair, and innovative European markets' (interview by Séverine Schrameck, *Concurrences* No 4-2024, art no 121361, 1 November 2024) <https://www.concurrences.com/IMG/pdf/margrethe_vestager_web.pdf?130736/28a380a0ce7f2a45568686aad43b4fb0aa4356a940aece0514f9072758b0f1d2> accessed 15 March 2026. Vestager stresses that algorithms cannot be used to shield firms from liability: what is illegal conduct offline remains illegal conduct online, even if adopted via the intervention of algorithms.

commercial strategies, whether horizontal or through vertical conduits). The policy impetus is to prevent clever re packaging of cartels – be it under the guise of distribution agreements, information-sharing platforms, or algorithms – from escaping antitrust scrutiny. Concerted practice remains a living concept, now tasked with addressing 21st-century collusion. Looking ahead, the EU's rigorous stance and adaptability mean that even as businesses employ new technologies and structures, the central message endures: companies must compete, not collude, and any knowing reduction of competitive uncertainty between them is likely to be met with vigorous enforcement. The continued refinement of this area – possibly through future case law or guidance on algorithm-driven tacit collusion – will determine how far the envelope of concerted practices can stretch. What is certain is that the concerted practices doctrine, as it stands today, embodies a half-century of doctrinal development that has greatly expanded enforcers' ability to safeguard markets, while also posing ongoing questions at the frontier of law, economics, and technology. It strikes a delicate balance between condemning harmful coordination and permitting legitimate cooperation, a balance that will be continually tested as EU competition law grapples with the complex realities of modern distribution networks and digital platforms.

CHAPTER 4 – CONCERTED PRACTICES IN DISTRIBUTION NETWORKS: UKRAINIAN PERSPECTIVE

Following Ukraine's independence from the Soviet Union in 1991, the country embarked on transforming its centrally planned economy into a market-oriented system. A crucial element of that transformation was to adopt a legal structure of competition – in order to dismantle monopolistic structures, deter collusion and promote fair competition in the marketplace. In the subsequent decades, Ukraine established a broad competition law regime based on international models and adapting to domestic economic-political realities. The Antimonopoly Committee of Ukraine (AMCU), created in 1993 as the national competition authority, has played a central role in enforcing these laws and advocating pro-competitive reforms. Today, Ukraine's competition policy is not only fundamental to its internal economic development but also a key aspect of its integration with the European Union, as the country aligns its laws with the EU acquis pursuant to the 2014 Association Agreement.[129]

This Chapter first recounts the historical development of Ukrainian competition law from the early 1990s to the present, highlighting major legislative acts and institutional developments. It divides the narrative into the initial post-Soviet era reforms, the modernization phase around the early 2000s, and the period of alignment with EU law and contemporary reforms. Throughout, the Chapter notes the shifting political and economic context – from the challenges of the 1990s transitional economy (dominated by state-owned monopolies and emerging oligarchs) to the more recent efforts to harmonize with EU standards as part of Ukraine's European integration and anti-corruption initiatives. Further on the Chapter provides an in-depth analysis of "concerted practices" under Ukrainian competition law – essentially, agreements or coordinated behavior among businesses that restrict competition. This part explains the legal definition of concerted practices in Ukraine and how it has evolved, especially under the influence of EU competition law doctrine (e.g. mirroring concepts found in Article 101 of the Treaty on the Functioning of the EU). It examines how the AMCU and Ukrainian courts have interpreted and enforced prohibitions on anticompetitive concerted actions, discussing both the doctrinal developments (such as

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[129] EU–Ukraine Association Agreement 2014, Chapter 10 (Competition Policy), requires Ukraine to approximate its competition law to EU law and ensure effective enforcement, including antitrust (agreements and abuse) and state aid control.

the introduction of a presumption of collusion from parallel conduct, and the adoption of leniency policies) and practical enforcement trends (including the prominence of bid-rigging cases and the pursuit of cartels involving major firms). Several cornerstone cases and decisions by the AMCU are referenced to illustrate these points, and the role of EU law as a benchmark or influence is analysed. Finally, the Chapter concludes with observations on the current state of Ukrainian competition law noting achievements in establishing a functioning anti-cartel enforcement system, as well as ongoing challenges and areas for further reform (such as improving leniency uptake and fully embedding EU norms).

4.1 Historical Development of Ukrainian Competition Law

After gaining independence Ukraine enacted its first competition legislation during the early Post-Soviet period in the 1990s. The foundational act was the Law of Ukraine "On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities", adopted on 18 February 1992.[130] This 1992 law (often referred to as the "Competition Law" of 1992, hereinafter the "Law No 2132-XII") provided the initial legal framework to curb monopolistic practices and unfair competition in the nascent market economy. It was heavily based on a 1991 Soviet model law ("On Restriction of Monopolistic Activity in the USSR") and thus introduced only basic antitrust norms adapted from the Soviet experience. Nevertheless, its adoption marked the first step in Ukraine's antimonopoly regulation – a "first stage" of competition law development for the young state.[131] The Law No. 2132-XII set out fundamental prohibitions against anticompetitive conduct (such as abuse of dominance and anticompetitive concerted actions) and declared the intent to protect and stimulate competition in Ukraine's economy.[132] Importantly, the law also provided for the creation of a dedicated national competition authority. In November 1993, the Ukrainian Parliament followed up by establishing the Antimonopoly Committee of Ukraine (AMCU) through the Law "On the Antimonopoly Committee of Ukraine" (26 November 1993).[133] The AMCU was constituted as a state body with special

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[130] Law of Ukraine "On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities", No. 2132-XII, adopted 18 February 1992. This was Ukraine's first competition law, based on a 1991 USSR law, providing basic antimonopoly rules. Law No. 2132's preamble set out the goal of curbing monopolism and unfair competition. (Law No. 2132 was later superseded by the 2001 Competition Law.)
[131] Oleksiy O Kot, *Competition Law of Ukraine* (Baltija Publishing 2021).
[132] Law No. 2132-XII (n 130) preamble.
[133] Law of Ukraine 'On the Antimonopoly Committee of Ukraine' No 3659-XII (26 November 1993). This law formally established the AMCU as the state authority with a mandate to control compliance with

status, independent of other government organs, empowered to enforce the antimonopoly legislation and defend the interests of entrepreneurs and consumers from violations of competition law. From its inception, the AMCU was envisaged as the key enforcer of competition rules in Ukraine, responsible for investigating violations and imposing sanctions, as well as advocating pro-competitive policies.

Through the mid-1990s, Ukraine was creating initial legislative framework. While the 1992 Competition Law covered both antitrust issues (like monopoly abuses and cartels) and unfair competition (such as trademark imitation or false advertising), it became evident that more detailed regulation was needed, especially as the Ukrainian economy evolved and privatization advanced. A separate Law "On Protection Against Unfair Competition" was adopted on 7 June 1996, coming into force in January 1997.[134] This law provided a more elaborate treatment of unfair competition practices (e.g. misleading advertising, inducement to breach contracts, dissemination of false statements, etc.), superseding the unfair competition provisions of the 1992 law. The legislative separation underscored a conceptual distinction between "competition law" in the strict antitrust sense and the broader unfair competition (commercial torts) sphere, aligning with European legal traditions that treat unfair competition under distinct legislation.

Meanwhile, the core antitrust provisions of the 1992 law underwent incremental refinement. Amendments in 1995 and 1998 adjusted various provisions of the 1992 Law No. 2132-XII, although no fundamental overhaul occurred in that decade. By the late 1990s, however, Ukraine recognized that its competition law regime – still rooted in the early post-Soviet template – required substantial modernization. The domestic economy had changed significantly, with extensive privatization leading to powerful industrial groups and oligopolistic market structures in sectors like energy, metallurgy, and telecommunications. The late 1990s also saw Ukraine starting to look towards integration with Western and European institutions, creating impetus to update its economic laws. These factors led to efforts for a new comprehensive competition law entering the 2000s.[135]

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antimonopoly legislation, defining its status, structure, and powers. Under this law, the AMCU is an executive body with special status, independent from other government bodies.

[134] Law of Ukraine 'On Protection Against Unfair Competition' No 236/96-BP (7 June 1996).

[135] Andriy Kuznetsov, *Competition Law of Ukraine* (Jurilox 2017) 5–10.

2001 marked a turning point in Ukrainian competition law. In January 2001, Parliament adopted the Law "On Protection of Economic Competition" (Law No. 2210-III), which came into force in 2002 and became the principal antitrust statute of Ukraine.[136] This law – often referred to as the LPEC (for Law on Protection of Economic Competition) – replaced the 1992 law as the main source of substantive competition rules. The 2001 LPEC was a thoroughly modern act, drafted with reference to European Union competition law and international best practices in antitrust enforcement. Its preamble declared that the law's purpose was to "ensure the protection of competition and limitation of monopolism in entrepreneurial activities". Substantively, the LPEC introduced modern principles and rules similar to those found in EU and US antitrust regimes. For example, it provided clearer definitions of prohibited anticompetitive conduct (such as anticompetitive concerted actions and abuse of dominance), established a refined merger control regime (requiring prior approval of concentrations meeting certain turnover/assets thresholds), and formalized procedures for the AMCU's investigations and decision-making. The adoption of the LPEC is often regarded as the second stage of Ukraine's antimonopoly legislation development, as it brought Ukraine's legal framework much closer to international standards and laid the foundation for enforcement practice as it exists today.[137]

Under the 2001 LPEC and the parallel 1996 Unfair Competition law, the AMCU gained a clearer mandate and toolkit. The AMCU was authorized not only to investigate and impose fines for violations, but also to issue individual exemptions (permissions) for concerted practices that could be justified on pro-competitive grounds, and to review mergers and acquisitions for competitive effects. In essence, by the early 2000s Ukraine had in place the familiar pillars of competition law: prohibitions on anticompetitive agreements (cartels and other concerted practices), prohibitions on abuse of a dominant position, and a merger control regime – all under the oversight of a central competition authority.

Throughout the 2000s, further refinement was made. Ukraine adopted various implementing regulations and guidelines to flesh out the 2001 LPEC. For instance, the AMCU issued procedural rules for merger notifications and for applications to authorize concerted actions, as well as methodology guidelines on defining market dominance and calculating fines. Specific "block exemptions" were also introduced by the AMCU with

[136] Law of Ukraine 'On Protection of Economic Competition' No 2210-III (11 January 2001).
[137] Kot (n 131).

approval of the Cabinet of Ministers – for example, a Vertical Block Exemption Regulation and exemptions for technology transfer and research & development agreements, mirroring EU block exemption regulations.[138] These measures provided businesses with clearer guidance on which cooperative agreements (especially vertical arrangements or joint ventures) would be tolerated.

In 2005, the competition law was amended to introduce a leniency program and a key evidentiary presumption (discussed in detail in Section 3 below). Additionally, the AMCU's enforcement powers grew with experience. By the mid-2000s, the AMCU had established itself as an active and relatively independent regulator, credited with developing its own enforcement practice and resisting political interference in many cases.[139]

One area of continued legislative development was the law on unfair competition. In December 2008, amendments were adopted that significantly updated the 1996 Law on Protection Against Unfair Competition.[140] These 2008 amendments clarified and expanded the catalogue of unfair competition violations – for example, introducing a new provision prohibiting the dissemination of misleading information to consumers (false or misleading claims in marketing), which in subsequent years became the single most common type of unfair competition case handled by the AMCU. The broadening of the unfair competition law reflected Ukraine's effort to address deceptive business practices and protect consumers, complementing the stricter antitrust focus of the LPEC.

By the end of the 2000s, Ukraine's competition law framework was comparatively robust on paper. In 2008, an OECD peer review concluded that Ukraine had a "comprehensive and well-designed competition law" and an "effectively managed and well-regarded agency" (the AMCU) to enforce it, while also noting areas for improvement (such as further aligning with EU law, increasing the AMCU's resources and autonomy, and eliminating some conflicting provisions in other laws). The basic legislative architecture –

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[138] Cartels Laws and Regulations 2025: Ukraine' (Global Legal Insights, 29 April 2025) <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/ukraine/> accessed 15 March 2026 (under headings 'Legislation' and 'Antitrust exemptions').

[139] Kuznetsov (n 135).

[140] Law of Ukraine 'On Protection Against Unfair Competition' (n 134) art 15-1; Law of Ukraine 'On Amendments to the Law of Ukraine "On Protection Against Unfair Competition"' No 689-VI (18 December 2008); Antimonopoly Committee of Ukraine, 'Звіт Антимонопольного комітету України за 2015 рік' [Annual Report of the Antimonopoly Committee of Ukraine for 2015] (14 March 2016) <https://amcu.gov.ua/storage/app/uploads/public/5ec/670/79d/5ec67079d27b3472768208.pdf> accessed 15 March 2026.

the 2001 LPEC, 4 the 1996 Unfair Competition law, the 1993 AMCU law, and related statutes – remained in force into the 2010s, with adjustments to address emerging issues and to move closer to European norms.

During the 2010s, Ukraine's competition law and policy underwent significant changes spurred by the country's goal of EU integration and internal demands for stronger economic governance. A milestone was the signing of the EU–Ukraine Association Agreement in 2014, which included commitments for Ukraine to approximate its competition laws and enforcement practices to those of the EU. Chapter 10 of this Agreement required Ukraine to implement key principles of EU competition law – effectively mandating convergence with the EU's prohibitions on cartels (anticompetitive agreements) and abuse of dominance, as well as establishing a system of state aid control similar to the EU's.

Throughout the late 2010s and early 2020s, the AMCU and legislature worked on a package often referred to as "competition law reform" aimed at further harmonization with EU law. This culminated in a substantial amendment law in 2023 (Law No. 3295-IX, adopted 8 August 2023) which updated several aspects of the LPEC and the AMCU Law. Key changes included: requiring a court order to conduct inspections (dawn raids) but explicitly detailing AMCU's powers during such raids (searches, seizures, etc.), making AMCU decisions directly enforceable (so that fines can be collected without protracted court procedures after a decision), introducing joint liability of corporate group members for fines, improving the leniency program (allowing reduction of fines for second and subsequent leniency applicants, analogous to EU's leniency regime), and enabling settlement procedures in antitrust cases. Additionally, the AMCU in 2023 revised its Methodology for Fines (notably, creating a new fining guideline, which was actually a specific requirement under the 2014 EU Association Agreement) and issued guidance on market definition in cases of buyer power.

By 2025, despite challenges such as the economic impact of war (since 2022) and institutional changes, the AMCU remains fully operational and continues to align its work with EU best practices.[141] The agency has demonstrated resilience by proceeding with

[141] Igor Svechkar and others, 'Main Developments in Competition Law and Policy 2024 – Ukraine' (Kluwer Competition Law Blog, 16 May 2025) <https://legalblogs.wolterskluwer.com/competition-blog/main-developments-in-competition-law-and-policy-2024-ukraine/> accessed 15 March 2026.

merger reviews, cartel investigations, and state aid control even amid wartime conditions. Recent enforcement statistics show a high volume of decisions (over a thousand in 2024) and significant fines imposed, especially in cartel cases and merger infringements.[142] The war-time context has also underscored the importance of competition enforcement in public procurement, as Ukraine seeks to safeguard reconstruction funds from collusion.

In sum, over approximately three decades, Ukraine's competition law has evolved from a rudimentary post-Soviet statute into a comprehensive regime largely modeled on European principles. The historical trajectory can be seen as moving through three phases: (1) Foundation (early 1990s): establishing basic antitrust rules and the AMCU; (2) Modernization (2000s): enacting a new competition law aligned with global standards and refining the enforcement system; (3) European Alignment (2010s–2020s): integrating EU norms and procedures and prioritizing anti-cartel enforcement and transparency. Each phase was influenced by the country's shifting political economy – from the chaotic 1990s transition, through the 2000s growth of private conglomerates, to the 2010s drive for EU membership and clean governance. This historical context sets the stage for a closer examination of a central concept in competition law: the treatment of concerted practices, i.e. collusive agreements or coordinated conduct among firms, which has been a focal point of enforcement by the AMCU.

4.2 The Concept of "Concerted Practices" in Ukrainian Competition Law

4.2.1 Legal Definition and Framework

Ukrainian competition law uses the term "concerted actions" (узгоджені дії, often translated as "concerted practices" or "concerted actions") to encompass any form of coordination between undertakings that affects competition. Notably, Ukrainian law does not actually use the word "cartel" in statutes; instead, it speaks of anticompetitive concerted actions when referring to what in other jurisdictions might be called cartels or unlawful agreements. This terminology aligns with that of EU competition law, which prohibits "agreements and concerted practices" restraining trade.

[142] Ibid (noting that by 2025, despite the war, the AMCU remained fully operational and agile, continuing reviews, investigations and alignment with EU law; and reporting that in 2024 the AMCU issued 1,146 decisions, imposed just over UAH 1 billion in fines, that nearly 90% of fines related to anticompetitive concerted practices and gun-jumping, that bid rigging accounted for all fines imposed for concerted practices, and that the updated leniency procedure was applied for the first time).

The primary legislation, the Law "On Protection of Economic Competition" (2001), draws a clear distinction between concerted actions in general and anticompetitive concerted actions. Article 5(1) of the LPEC defines "concerted actions" broadly as any form of coordination among businesses: it covers the conclusion of agreements in any form between undertakings, any decisions by associations of undertakings, and any other coordinated competitive conduct or inactivity by multiple undertakings. In other words, whether firms explicitly enter into a contract or merely tacitly coordinate their behavior, and whether the coordination is horizontal (between competitors) or vertical (between suppliers and distributors), it can fall under the concept of concerted actions if their market behavior is aligned by agreement or understanding. The law even stipulates that the establishment of a joint venture or association can be considered a concerted action if it leads to the coordination of competitive behavior between the founders – essentially capturing joint venture agreements under this rubric (a provision introduced by a 2005 amendment).[143]

Article 6(1) of the LPEC then defines anticompetitive concerted actions as concerted actions "which have resulted or may result in the prevention, elimination, or restriction of competition."[144] This is the functional test: any concerted practice that has the object or potential effect of appreciably restraining competition in a market is deemed anticompetitive and is generally prohibited. Article 6(2) provides a non-exhaustive list of hardcore examples of anticompetitive concerted actions, which closely mirror classic cartel conduct: these include fixing prices or other trading conditions, limiting production or markets, sharing markets or sources of supply, bid rigging (collusive tendering), boycotts or market exclusion, discriminatory terms creating competitive disadvantages, tying or other contract conditions not related to the subject of a contract, and other practices that significantly limit competitiveness of other firms. This list of eight categories in Article 6(2) is analogous to

[143] LPEC (n 136) art 5(1). See official English translation: 'Concerted actions shall mean concluding agreements in any form by undertakings, making decisions in any form by associations, as well as any other concerted competitive behaviour (activity or inactivity) of undertakings.' This encompasses all forms of collusion or coordination. Article 5(1) was amended in 2005 to include establishing a new undertaking or association that leads to coordination as also being a concerted action.

[144] Ibid, arts 6(1)–(2), 6(4), 52. Article 6(1) defines anticompetitive concerted actions as those resulting or potentially resulting in the prevention, elimination or restriction of competition. Article 6(2) lists illustrative forms (eg price-fixing, market allocation, bid rigging, boycotts, discriminatory terms and tie-ins). Article 6(4) prohibits anticompetitive concerted actions and makes them sanctionable. Article 52 provides for fines of up to 10% of the annual turnover of each infringing undertaking.

the types of agreements prohibited under Article 101(1) of the EU Treaty and comparable provisions in other jurisdictions.

A notable aspect of Ukrainian law is Article 6(3) of LPEC, which establishes a rebuttable presumption of concerted action in cases of parallel behavior. It states that anticompetitive concerted actions also include situations where businesses engage in "similar actions or omissions" in the market that result in a competition restriction, if an analysis of market conditions shows no objective reasons for such behavior other than the concerted action. In practice, this provision means that if competing firms all simultaneously undertake the same conduct (such as synchronously raising prices or withdrawing a product), and there is no plausible explanation (like the same cost shock affecting all), the AMCU can presume a concerted practice exists even without direct evidence of an explicit agreement. The burden then shifts to the companies to rebut the presumption by pointing to independent reasons for their parallel conduct. This codified presumption, introduced in 2005, strengthens the AMCU's hand in tackling cartels by allowing the use of circumstantial evidence of coordination (similar to the "plus factors" concept in other jurisdictions), though it must be applied with caution to avoid penalizing mere conscious parallelism. EU competition law, by contrast, does not have an explicit statutory presumption, relying on case law to infer agreements from conduct; Ukraine's approach essentially embeds a presumption into legislation, underscoring a strong stance against tacit collusion.[145]

Ukrainian law flatly prohibits anticompetitive concerted actions (save for exemptions or authorized cases) in Article 6(4) and provides for sanctions under Article 52 (fines up to 10% of annual revenue for the violating undertakings). There are, however, important exceptions and procedures for clearance:

• *Exemptions (Permits):* Article 10 of the LPEC allows businesses to apply to the AMCU for an individual permission (exemption) for concerted actions that technically restrict competition but also produce positive effects that outweigh the

[145] LPEC (n 136) arts 6(3) and 6(5). Article 6(3) provides that performing similar actions (or inaction) by competitors in a market, which leads or may lead to a restriction of competition, is deemed an anticompetitive concerted action if market analysis shows no objective reasons for such conduct other than coordination (added by Law No 2596-IV of 31 May 2005). Article 6(5) introduces leniency: an undertaking that participated in a cartel but voluntarily informs the AMCU first and provides evidence crucial for the case is exempt from liability (fine), unless it fails to cease the infringement, was the initiator/leader, or conceals evidence. Recent amendments (Law No 3295-IX, 2023) modified leniency to allow fine reductions for subsequent applicants (50%/30%/20% for the 2nd/3rd/4th applicant).

anticompetitive harm. This reflects the EU's approach of 7 exemption/efficiency defence (similar to Article 101(3) TFEU). In Ukraine, the law lists possible pro-competitive justifications such as improvement of production or distribution, technical progress, export development, etc., provided that competition is not eliminated completely. The AMCU may grant a time-limited permit if these conditions are met. For example, a joint R&D agreement or a specialization agreement between companies might be approved if it helps innovation and consumers, even though it reduces competition between the parties. Additionally, "block exemptions" (called "general exemptions" in Ukrainian practice) exist via regulations: if concerted actions meet certain criteria (e.g. parties' market share below a threshold and clauses not containing hardcore restrictions), they are exempted by default and need no AMCU clearance. For instance, most vertical agreements are exempt if neither party has over 30% market share and the agreement does not contain egregious restraints – echoing the EU's Vertical Block Exemption.

• *Small/Medium Enterprises (SME):* Article 7 of LPEC provides a de minimis rule for concerted actions among SMEs, stating that concerted actions of small or medium-sized enterprises aimed at joint procurement or other cooperation are not caught by the prohibition if they do not significantly restrict competition and instead improve the competitiveness of those SMEs. This is designed to allow smaller firms to collaborate in ways that help them compete with larger players, recognizing that such cooperation can be pro-competitive.

In summary, the legislative framework defines concerted practices broadly and prohibits those that harm competition, while also carving out avenues for benign cooperation to proceed (through exemptions or safe harbours). The language of the Ukrainian law is notably aligned with EU competition law terminology, reflecting the intentional approximation of concepts.

4.2.2 Doctrinal Evolution and EU Influence

The concept of concerted practices in Ukrainian law has evolved in tandem with the country's legislative reforms and growing influence of EU doctrine. Under the 1992 law, the prohibition on anticompetitive arrangements existed but was relatively rudimentary. The

1992 law forbade anticompetitive “agreements” between enterprises and any other concerted actions that could lead to monopolization or restriction of competition. However, detailed definitions and categories (like those now in Article 6(2) of LPEC) were less developed. The older law also did not explicitly articulate the notion of tacit collusion or a presumption from parallel conduct. Enforcement in the 1990s under Law No. 2132-XII was in its infancy, focusing often on obvious cartel agreements or abuses by dominant, formerly state-owned monopolies, with limited doctrinal analysis.

With the 2001 LPEC, Ukraine incorporated much more refined competition doctrine. The influence of EU law is evident in the structure of Article 6 (which closely tracked Art. 81(1) of the EC Treaty, now 101(1) TFEU) and Article 10 (mirroring Art. 101(3) TFEU’s exemption criteria). Ukrainian competition scholars and drafters looked to EU regulations and cases when formulating definitions. For instance, the inclusion of association decisions as concerted actions, and the treatment of “any other coordinated behavior” in Article 5(1), echo the EU concept that a concerted practice can be any knowing substitution of cooperation for competition. The Explanatory Note to the LPEC at the time of adoption emphasized modernizing Ukraine’s approach in line with European standards.

The 2005 amendments to the LPEC represented a doctrinal leap: introducing the aforementioned Article 6(3) presumption and a formal leniency program in Article 6(5). These changes were likely influenced both by EU practice and by experiences of other jurisdictions in fighting cartels. The presumption provision (6(3)) can be seen as a response to evidentiary difficulties in proving cartel agreements – a problem universally faced by antitrust enforcers. While EU law requires showing some form of contact or “meeting of minds” in practice, Ukraine chose to codify an inference tool. The leniency provision (6(5)), which grants immunity from fines to the first cartel participant who self-reports and provides evidence, was directly drawn from international best practices (the US DOJ and EU’s leniency programs). It signaled a recognition that incentivizing whistle-blowers is key to detecting secret cartels. Initially, Ukraine’s leniency rule required that the applicant be the first to report and do so before the AMCU had knowledge of the cartel, in exchange for full immunity. However, as noted later, actual use of leniency remained very low for many years, prompting further amendments in the 2020s.

EU influence became even more pronounced after 2014 with the Association Agreement obligations. The AMCU and Ukrainian lawmakers have since consulted closely with the European Commission and international advisers to align definitions and enforcement guidelines. For example, Ukraine adopted guidelines analogous to the EU's on vertical restraints and on the definition of relevant market (using concepts like the SSNIP test). In 2016, the AMCU introduced a Vertical Block Exemption regulation and guidelines on concerted practices in supply agreements, explicitly modeling them on EU Regulations on vertical agreements, etc. Moreover, the improvement of the leniency regime in 2022–2023 (allowing reductions of fines for second and third applicants, not just a single immunity) was taken straight from the EU's leniency policy which offers tiered discounts to subsequent cooperators.

Another doctrinal issue has been resolving inconsistencies between Ukraine's competition law and other domestic laws. One such inconsistency was found in the Commercial Code (2003), which had some outdated or conflicting provisions (e.g., an article that seemed to allow certain price-fixing "under conditions of monopoly" or references to "concerted pricing" under state regulation). The OECD and EU experts recommended repealing or amending those Code articles to remove confusion, as noted in the 2008 OECD review.[146] In practice, Ukrainian courts and the AMCU have given primacy to the specialized competition laws over the code in case of conflict , and recent legislative proposals have aimed to excise those anomalies, ensuring a coherent doctrine that anticompetitive concerted actions are per se unlawful unless exempted by the competition law itself.

Ukrainian legal scholarship on competition law has expanded since the 2000s, with commentators examining how closely to follow EU jurisprudence. For example, the notion of what constitutes a "concerted practice" (as opposed to mere conscious parallelism) has

[146] OECD, 'Peer Review of Ukraine's Competition Law and Policy: Note by the Secretariat' (DAF/COMP/GF(2008)1/FINAL, 15 April 2008) <https://one.oecd.org/document/DAF/COMP/GF(2008)1/FINAL/en/pdf> accessed 15 March 2026; OECD, *OECD Reviews of Competition Law and Policy: Ukraine 2016* (OECD Publishing 2016) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/12/oecd-reviews-of-competition-law-and-policy-ukraine-2016_51d9bb98/3f9077f9-en.pdf> accessed 15 March 2026. The 2008 review concluded Ukraine had a solid legal framework and agency, but recommended aligning further with EU law, increasing transparency, and removing contradictions in laws. The 2016 OECD review noted improvements (including higher merger thresholds and a state aid law), while urging more effective cartel enforcement and greater use of leniency.

been explored in light of EU cases like ICI v Commission (Dyestuffs) and Woodpulp, which set standards for inferring collusion. The consensus in Ukraine's doctrine is to follow the EU approach: parallel conduct by itself is not illegal, but parallel conduct plus additional evidence of contact or inexplicability may constitute a concerted practice. Article 6(3) essentially codifies this by requiring the AMCU to conduct an analysis ruling out other reasons for parallelism. Additionally, the concept of "single economic entity" (related to corporate affiliations coordinating market behavior) has been discussed, especially in cases where groups of companies under common control were accused of concerted actions (see Section 3.4 for a notable case). Ukrainian enforcement has had to grapple with distinguishing legitimate intra-group coordination from unlawful collusion between ostensibly separate firms – here again EU principles (on parent subsidiary not being separate undertakings) are relevant.

In sum, the doctrinal evolution of concerted practices in Ukraine shows a trajectory of increasing sophistication and convergence with European competition law. From a simple ban on anti-competitive 9 agreements in 1992, Ukraine now has a nuanced legal framework that addresses explicit cartels, tacit collusion, vertical agreements, and cooperative joint ventures, with mechanisms for exemption and leniency, all largely inspired by EU law and global best practices. The next sections turn to how these rules have been enforced in practice by the AMCU, and what major cases illustrate the application of the "concerted practices" concept.

4.3 Landmark Cases on Concerted Practices

The Antimonopoly Committee of Ukraine (AMCU) has addressed concerted practices through several notable case studies and practical examples, reflecting its efforts to align with EU competition law standards under the EU-Ukraine Association Agreement and the Law on Protection of Economic Competition. These cases, most notably in retail, pharmaceutical and e-commerce, demonstrate the AMCU's enforcement skills and challenges in determining and sanctioning coordination (vertical restraints, hub-and-spoke, etc.), including in case law on EU regulations, such as T-Mobile Netherlands (2009) and Argos and Umbro (2006). Yet deficiencies in evidentiary standards, technological tools, and institutional capacity often prevent a holistic response, particularly in digital markets.

Herein, an in-depth and coherent analysis on different case studies and cases in detail is made, their context, findings, and implications for competition law in Ukraine:

Petroleum Retail Cartel (2021): In 2021, the AMCU imposed its largest-ever fine for an anticompetitive concerted practice, against a group of leading oil product manufacturers and petrol station chains. These companies (allegedly controlled by a prominent Ukrainian oligarch) were found to have coordinated retail prices for gasoline and diesel over a prolonged period. The AMCU's investigation noted that the firms moved their pump prices in near lockstep without cost justification, and evidence suggested centralized decision-making. The total fines imposed were approximately €140 million – an unprecedented amount in Ukraine (by comparison, the typical annual total of cartel fines had been under €20 million).[147] This case was significant not only for its magnitude but also because it demonstrated the AMCU's willingness to challenge politically connected business interests. The companies denied being part of a single group (to contest the finding of concerted action, claiming independent pricing), but the AMCU used the concept of a single economic entity and/or concerted practice by affiliated undertakings to uphold liability. The case also underscored the problem of market oligopoly in fuel retail; it followed earlier attempts by the AMCU to curb price coordination in fuel markets (e.g., investigations in 2005 and 2016 on similar issues, though with smaller fines). The 2021 decision was hailed as a bold enforcement move, though appeals were immediately filed and litigation is ongoing. It reflects a "step change" in sanction levels – moving Ukraine closer to EU-level fines as a deterrent.

Liquefied Petroleum Gas (LPG) Auction Cartel (2017): In 2017, the AMCU fined several companies around UAH 41 million for rigging bids in auctions of liquefied petroleum gas (LPG) sold by a state owned producer. The case was interesting because it involved collusion to suppress competition in auctions by which gas was sold to traders – essentially a market-sharing arrangement in a critical commodity. The AMCU's decision was upheld by courts in subsequent years,

[147] Antimonopoly Committee of Ukraine, Decision No 178-p (30 March 2021) in case No 143-26.13/153-16 (retail markets for light oil products; Avias/Ukrtatnafta and 169 fuel station operators) <https://amcu.gov.ua/storage/app/uploads/public/607/44c/9aa/60744c9aa0bdf519436313.pdf> accessed 15 March 2026.

reinforcing the illegality of bid allocation schemes. This case also intersected with issues of state-owned enterprise reform and transparent pricing.[148]

Pharmaceutical Parallel Pricing (ongoing): In 2024, the AMCU initiated a high-profile investigation into alleged concerted practices among pharmaceutical distributors and pharmacy chains for setting 13 similar prices on certain medicines.[149] This came after observing that prices for some drugs moved uniformly across different pharmacy networks without obvious cause. While as of early 2025 no decision had been reached, the case is poised to clarify the use of the Article 6(3) presumption. If the AMCU issues a decision finding a concerted practice in the absence of a “smoking gun” agreement, it could set a precedent for how economic evidence alone can establish collusion. The investigation also signals the AMCU’s attentiveness to sectors that directly impact consumers’ expenses (healthcare in this case).

Oligarchic Groups and Tacit Coordination: Apart from overt cartels, the AMCU has confronted scenarios where large conglomerates with common ownership structures engage in coordination. One example was the Azot fertilizer cases (2016–2019) involving companies in the Ostchem group (owned by oligarch Dmytro Firtash) which the AMCU investigated for possibly coordinating production and pricing. The AMCU held that the resale of natural gas between Group members has signs of intra-group manipulation of the cost of the main raw material – natural gas, which led to an unreasonable level of the company's costs for the production of goods, namely, the establishment of an unreasonable level of the cost of products manufactured by the plant, and to artificially inflated sales prices for finished products on the domestic

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148 Antimonopoly Committee of Ukraine, Decision No 315-р (21 June 2018) in case No 128-26.13/102-17 (anticompetitive concerted practices on LPG markets around August 2017; state LPG auctions by UGV/Ukrnafta) <https://amcu.gov.ua/static-objects/amcu/uploads/public/5db/1c5/482/5db1c5482f603167176117.pdf> accessed 15 March 2026. See paras 10–12 on auction mechanics (operative findings on parallel price movements).

149 Antimonopoly Committee of Ukraine, ‘АМКУ оштрафував дистриб’юторів лікарських засобів на понад 4 млрд грн’ [AMCU fined pharmaceutical distributors more than UAH 4 billion] (press release, 31 July 2025) <https://amcu.gov.ua/news/amku-oshtrafuvav-dystrybiutoriv-likarskykh-zasobiv-na-ponad-4-mlrd-hrn> accessed 15 March 2026. Decision finding concerted practices by two major distributors under art 6(3) LPEC.

market.[150] While those particular allegations were ultimately addressed under abuse of dominance theories (with the AMCU ordering divestment of factories to dilute common ownership), they raised an interesting question: when multiple companies under de facto common control align their conduct, is it a concerted practice or a single economic entity acting unilaterally? The AMCU tends to treat them as a single undertaking if control can be established, but in instances where affiliation is suspected but not legally proven, the AMCU might proceed under concerted action theories.

Through these landmark cases, a few themes emerge: bid rigging is systematically pursued and punished due to its prevalence and harm; major cartels in key industries (fuel, fertilizers, pharmaceuticals etc.) have been tackled, signifying the maturing of enforcement; and Ukraine is increasingly willing to impose deterrent-level fines (nine-digit figures in local currency) and even consider structural remedies to combat cartels and other antitrust violations. The cases also illustrate the influence of EU competition law – for example the analysis of plus-factors for collusion are straight from the EU playbook, adapted to Ukrainian reality.

Finally, it is important to note the role of the courts in shaping the concept of concerted practices. While Ukraine does not have a rich body of published judicial opinions interpreting Article 6 of LPEC, courts have dealt with appeals on issues like evidence sufficiency and proper procedural conduct. For instance, courts have occasionally overturned AMCU decisions if the Committee could not demonstrate that the defendants had an opportunity to coordinate or if procedural rights (like access to the file or proper notification) were violated. These judicial checks ensure that the AMCU refines its approach – e.g., providing more rigorous economic evidence in parallel behavior cases and strictly

[150] Antimonopoly Committee of Ukraine, Decision No 598-р 'Про порушення законодавства про захист економічної конкуренції, накладення штрафу та примусовий поділ' [On infringement of competition law, imposition of a fine and compulsory divestiture] (5 September 2019) case No 126-26.13/67-15 <https://amcu.gov.ua/npas/rishennya-598-r-vid-05092019> accessed 15 March 2026; Supreme Court (Commercial Cassation Court), postanova of 5 July 2022, case No 910/15541/19 (Ukraine) (holding that references to merely possible negative consequences from 2014–2015 do not discharge the AMCU's burden to prove actual harm to consumers); Antimonopoly Committee of Ukraine, 'Огляд судової практики Верховного Суду з питань застосування законодавства про захист економічної конкуренції' [Review of Supreme Court case law on the application of legislation on the protection of economic competition] (2023) 6 (pts 7–8) <https://amcu.gov.ua/storage/app/uploads/public/648/312/0d5/6483120d5ebab938710222.pdf> accessed 15 March 2026.

following due process in investigations. Over time, as more cases get resolved through final court judgments, a clearer judicial doctrine on concerted practices will likely emerge, further solidifying the concept in Ukrainian law.

4.4 Algorithmic Collusion as a Concerted Practice: Ukrainian Perspective

Algorithmic collusion refers to coordination between competitors facilitated through automated systems or algorithms, rather than traditional secret meetings or direct communications. In the digital economy, firms increasingly rely on pricing algorithms, data analytics, and AI tools to set prices and terms. These algorithms can either implement explicit agreements (e.g. competitors programming their software to follow a fixed pricing formula jointly agreed) or they might autonomously reach a coordinated equilibrium (tacitly aligning prices by reacting to each other's moves). The rise of algorithmic pricing blurs the line between mere conscious parallelism and illicit concerted practice, as algorithms enable rapid, data-driven alignment of market behavior without overt human contact. Under Ukrainian law, there is no special carve-out for algorithm-driven coordination – thus, if the outcome of algorithmic interactions is collusive pricing or other anti-competitive behavior, it falls within the scope of Article 6 of LPEC on concerted actions.

In practice, algorithmic collusion could be captured under the existing concepts of agreement or concerted practice. For instance, if competing firms agree to use a common pricing algorithm or to share real-time data that allows each other's algorithms to match prices, this can be viewed as a cartel by design (explicit algorithmic collusion). A well-known international example is the "Topkins" case in the United States, where several online sellers conspired to fix prices of posters on Amazon Marketplace by adopting a shared algorithm; they wrote computer code instructing their pricing software to set prices in conformity with the agreed scheme.[151] In that case, the algorithm was merely the tool implementing a classic price-fixing agreement, and it was prosecuted as a hard-core cartel (the first of its kind in e-commerce).[152] An analogous scenario under Ukrainian law would clearly violate Article 6(2)(1) (price-fixing) and Article 6(2)(8) (other concerted actions restricting competition without justification), with the algorithm viewed as the means of

[151] *United States v Topkins (No CR 15-00201 WHO) (ND Cal, Information filed 6 April 2015).*
[152] US Department of Justice, Office of Public Affairs, 'Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution' (Press Release, 6 April 2015) <https://www.justice.gov/archives/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace> accessed 15 March 2026.

coordination. The legal characterization in Ukraine would be no different than for a traditional cartel: the firms' conduct, through the algorithm, constitutes a concerted action to fix prices.

More challenging is the scenario of tacit algorithmic collusion, where companies independently deploy self-learning or predictable algorithms that end up coordinating prices without any explicit agreement. Here, each firm might insist it never intended to collude – they simply followed their own algorithm's output. Under EU law, such purely tacit collusion remains outside the reach of Article 101 TFEU (competition authorities cannot penalize companies for mere algorithm-driven parallel pricing absent some form of contact or "meeting of minds"). Ukrainian law, however, with Article 6(3), potentially provides the AMCU a tool to address this gap. If multiple competitors' pricing algorithms consistently set similar prices and move in lockstep without any obvious economic reason, the AMCU could deem this a prohibited concerted practice on the basis that the firms engaged in "similar actions… which led to the restriction of competition" with no objective justification.[153] In essence, Ukrainian law would treat the algorithms' parallel conduct as evidence of an implied coordination. This could apply, for example, if a few dominant online retailers all deploy AI pricing software that spontaneously learns to avoid price undercutting and instead maintains supra-competitive prices – absent evidence of a secret pact, the AMCU might still infer a concerted outcome by examining market structure and data flows.

Legal doctrine in Ukraine has begun grappling with these questions. Commentators emphasize that while algorithms can amplify the risk of collusion (by instantly sharing market data, monitoring rivals' prices, and retaliating against price cuts), enforcement agencies must still distinguish correlation from collusion. If competitors all use a similar "off-the-shelf" pricing algorithm (possibly provided by the same software supplier), this hub-and-spoke situation may facilitate aligned pricing without direct contact between the rivals. In Ukraine, such use of a common algorithmic "hub" to exchange market information or set uniform pricing parameters could well be viewed as a concerted action via a third party, analogous to information exchange through a pricing consultant. Indeed, the AMCU's

[153] Igor Svechkar and others, 'Restraints of trade and dominance in Ukraine: overview' (Thomson Reuters Practical Law, 1 February 2021) <https://www.asterslaw.com/press_center/publications/restraints_of_trade_and_dominance_in_ukraine_overview1/> accessed 15 March 2026.

contribution to the OECD noted that modern distribution networks use optimized automated pricing systems processing huge amounts of data, and raised concerns about how common data platforms or software can lead to coordinated outcomes. The enforcement approach is to scrutinize whether algorithms are effectively substituting for an explicit agreement – for example, by continuously exchanging real-time pricing info or by being programmed to follow a competitor's price changes automatically (a form of predictable-agent strategy). If so, the concerted practice doctrine applies in full force.

That said, proving an algorithm-driven concerted practice remains evidentially complex. The AMCU would likely look for facilitating factors such as: the same data source or pricing software used by all major firms, any communication or arrangement to deploy algorithms in a coordinated way, or an external "hub" (like a consulting firm or platform) optimizing everyone's prices. Absent such factors, relying solely on Article 6(3)'s presumption from parallel outcomes can be contentious. The experience of the AMCU's high-profile "retailers' case" illustrates both the agency's willingness to apply these concepts and the hurdles encountered in court.

The 2015 Retailers' Cartel (Nielsen Case)

One of the earliest and most significant Ukrainian cases touching on algorithmic collusion is the AMCU's investigation into leading supermarket chains, often referred to as the "retailers' case."[154] The case, decided by the AMCU in April–May 2015, involved 18 large food retail networks operating in Kyiv (including national and international chains such as Auchan, METRO, Billa, ATB, Fozzy, etc.) and the market research firm ACNielsen Ukraine . The essence of the AMCU's allegation was that these supermarket chains had engaged in long-term concerted anti-competitive practices in their distribution network effectively a price-fixing cartel – facilitated by exchange of detailed information via Nielsen and by uniform trading practices with suppliers that removed competitive uncertainty.

According to the AMCU's findings, each retail chain regularly provided ACNielsen with granular, up-to-date data on their sales, prices, stock and other key indicators. Nielsen, in turn, aggregated and circulated these market data back to all the participating retailers in

[154] Antimonopoly Committee of Ukraine, Decision No 182-p (29 April 2015) (Retail chains and AC Nielsen Ukraine) <https://amcu.gov.ua/npas/vityag-iz-rishennya-182-r-vid-29042015> accessed 15 March 2026. AMCU Decision No 182-p of 29 April 2015 (Retail Chains & AC Nielsen Ukraine) – often termed the 'retailers' cartel' case.

frequent reports (through online portals, servers, emails, etc.), creating a closed information system among competitors. This scheme gave all major retailers near-real-time insight into each other's pricing and sales performance – far beyond what any could obtain from public sources. At the same time, the retailers were found to be using similar pricing software and category management tools, often adjusting prices in parallel based on the shared data. The AMCU noted that all the chains employed automated pricing algorithms that calculated retail prices by applying set mark-ups to procurement prices, and that they conducted regular price monitoring of rivals. However, the only competitive factor these algorithms seemed to account for was the information obtained via Nielsen – in effect, each retailer's pricing decisions heavily relied on knowing the internal sales of its competitors.[155]

Judicial review of the retailers' case proved eventful. Many of the sanctioned chains challenged the AMCU's decision in Ukrainian courts, leading to protracted litigation. Initially, the first-instance and appellate courts sided mostly with the retailers, finding that the AMCU's evidence of a cartel was insufficient to meet the legal standard of proof. In 2016, the High Commercial Court (cassation instance) intervened, quashing those lower court judgments and ordering a re-hearing on the merits. Upon rehearing, however, the Kyiv Commercial Court again ruled in favor of the retailers, and over time several defendants obtained final court rulings annulling the AMCU's decision (as it applied to them) for lack of adequately proven infringement. According to the AMCU Chairman at the time (Yuriy Terentyev), in a majority of the cases the courts found "the facts were not sufficiently proven to uphold the AMCU's 2015 decision."[156] In particular, the judiciary appeared unconvinced that the parallel pricing was the result of a concerted practice rather than independent responses to market conditions. The outcome was that the retailers' cartel decision largely unraveled on appeal, underscoring the difficulty in securing convictions for algorithmic or data driven tacit collusion. This was a setback for the AMCU; it highlighted that while Article 6(3) gives the authority a broad presumption, Ukrainian judges require compelling evidence distinguishing collusion from mere "conscious parallelism."

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[155] OECD, 'Algorithms and Collusion – Note by Ukraine' (DAF/COMP/WD(2017)23, 16 May 2017) paras 1–4 https://one.oecd.org/document/DAF/COMP/WD(2017)23/en/pdf accessed 31 January 2026. The investigation was opened in 2012 amid unexplained food price inflation in Kyiv. Respondents included 18 supermarket chains (eg Fozzy, ATB, Auchan, Metro, Billa) and LLC 'ACNielsen Ukraine'.

[156] Association of Retailers of Ukraine, 'Суди переважно підтримали рітейлерів у справі АМКУ про картельну змову' (19 March 2018) <https://rau.ua/news/sudy-podderzhali-ritejl-v-dele-amku/> accessed 15 March 2026.

From a comparative perspective, the retailers/Nielsen case in Ukraine mirrors issues seen in the EU's Eturas case (discussed above) – both involve an electronic platform or service that uniformly influences multiple competitors' market behavior. The Ukrainian case demonstrated the AMCU's readiness to characterize industry-wide data sharing and analytics as a concerted practice. It also exposed a potential gap between administrative enforcement and judicial approval: even with a legal presumption against parallel conduct, the fact-finder must be convinced that the only plausible explanation is collusion. The legacy of the case is a caution that algorithmic or IT-facilitated collusion can be targeted under Ukrainian law, but success may hinge on robust economic analysis and perhaps direct evidence (e.g. communications about using the shared data to adjust prices).

AMCU's Investigation of BlaBlaCar (2023)

A more recent development in Ukraine – albeit in a unilateral conduct context – sheds light on the competition authority's concerns about algorithms.

In 2023, the AMCU investigated the practices of BlaBlaCar, a popular online car-pooling platform, in what has been billed as Ukraine's first digital platform antitrust case. BlaBlaCar was found to hold a dominant position in the "carpooling services" market in Ukraine.[157] While this was not a collusion case (it involved an allegedly dominant firm rather than an agreement among competitors), the AMCU's focus on algorithmic pricing in this matter is telling.

The key issue was BlaBlaCar's dynamic pricing algorithm for its service fee (the commission charged to passengers). The AMCU observed that the platform's fee and refund system lacked transparency and consistency. In its decision (adopted as recommendations in early 2024 to avoid formal penalties), the AMCU warned that "algorithmic pricing" needs to be transparent and economically justified. The authority explicitly stated that an opaque algorithm – where the operator cannot clearly explain the factors and logic determining the price – raises suspicions of unjustified pricing and potential consumer harm. According to the AMCU, if a dominant company's algorithm sets prices that appear elevated and the company cannot demonstrate a clear, objective cost-based rationale, this lack of

[157] Tetiana Bebik and Olesia Kryvetska, 'Ukraine's First Digital Platform Antitrust Case: What You Need to Know' (Lexology, 7 February 2025) <https://www.lexology.com/library/detail.aspx?g=e2354201-f771-4202-89d4-9bd2048c0441 > accessed 15 March 2026.

transparency is viewed as a sign of an anti-competitive (unfair) practice.[158] In BlaBlaCar's case, the AMCU did not find that the platform had fixed prices with any competitor (indeed, BlaBlaCar is a single firm and its drivers set ride prices). Instead, the concern was an alleged abuse of dominance: imposing possibly unfair high service fees and arbitrary refund rules on users. The novelty was tying this to the algorithm's opacity effectively considering whether "black-box" algorithms in a dominant firm can violate competition law by impeding oversight of pricing fairness.

BlaBlaCar avoided fines by cooperating and implementing the AMCU's recommendations. It provided an economic analysis to justify its fee structure by comparison with other countries, and it agreed to clarify its terms (for example, informing users that rebooking within a timeframe could avoid fees, which previously was not disclosed). The AMCU's handling of BlaBlaCar signals an interesting approach: even though no collusion was involved, the authority treated algorithm-driven practices with skepticism, demanding algorithmic transparency as a safeguard. This aligns with a broader policy message algorithms should not become a shield for anti-competitive behavior.

For distribution networks and concerted practices, the lesson from BlaBlaCar is that the AMCU is attuned to algorithmic decision-making and its impact on competition. If, for example, in a network of competitors all adopted a similar non-transparent pricing algorithm (even via a third-party vendor), the AMCU might view the situation with the same skepticism – namely, that the algorithm could be enabling supra-competitive pricing with no accountability. The expectation set by the AMCU is that companies (especially those with market power) must be able to explain how their algorithms reach pricing decisions so that regulators can verify there is no hidden collusion or abuse. This dovetails with emerging discussions in the EU about auditing algorithms and ensuring they are not inadvertently colluding.

[158] Antimonopoly Committee of Ukraine, Recommendations No 8-рк (19 December 2024) (ТОВ 'І-ТРЕВЕЛС' (BlaBlaCar)) <https://amcu.gov.ua/static-objects/amcu/uploads/public/677/649/b7a/677649b7a7a34724115144.pdf> accessed 15 March 2026. The AMCU found BlaBlaCar dominant in carpooling services and flagged non-transparent service fee algorithms and inconsistent refund policies as potentially abusive. Instead of a fine, recommendations were issued.

4.5 Concluding remarks

Over the past thirty years, Ukrainian competition law has been transformed from a simplistic post-Soviet monopoly regulation into a comprehensive legal regime that in many respects aligns with European Union competition law standards. The historical development of this field reflects Ukraine's broader journey – from the early 1990s transition, grappling with the legacies of a command economy, to a modernizing state seeking integration into the European economic order. Key milestones such as the 1992 foundational law, the creation of the Antimonopoly Committee in 1993, the adoption of the 2001 Law on Protection of Economic Competition, and the continuous reforms through the 2010s and 2020s (especially under the impetus of the 2014 EU Association Agreement) have each contributed to building a more effective competition policy system.

The Antimonopoly Committee of Ukraine has emerged as a central institution in ensuring markets remain competitive. Despite periods of political and economic turbulence – and currently operating amid the severe challenges of war – the AMCU has maintained enforcement activities and even advanced significant reforms. It has gained investigative powers comparable to those of its European counterparts and strived to apply them transparently and predictably (for instance, publishing decisions and guidelines, introducing structured fine calculations, etc.). The requirement to publish decisions and the adoption of enforcement guidelines have improved transparency and consistency, bolstering the AMCU's credibility as an independent regulator. International peer reviews (OECD) and cooperation with the European Commission have both recognized progress and pointed out areas for improvement, many of which Ukraine has been addressing (e.g., raising merger thresholds, refining leniency, eliminating conflicting legal norms, and enhancing due process in investigations).

The focus on "concerted practices" in this Chapter highlights the strides Ukraine has made in tackling what is arguably the most covert and damaging violation of competition law: collusion among competitors. The legal concept of anticompetitive concerted actions under Ukrainian law is broadly in line with international norms – covering any form of agreement or coordination that restricts competition – but with its own local nuances like the statutory presumption from parallel conduct. Enforcement experience shows that Ukraine, like many jurisdictions, has faced an endemic problem with bid rigging in public procurement and collusive arrangements in concentrated markets (often controlled by powerful business interests). Through the AMCU’s efforts, hundreds of such cases have been detected and sanctioned, indicating an enforcement regime that does not shy away from complex or sensitive cases. The imposition of heavier fines in recent years (including record-breaking penalties) sends a message that cartel conduct will carry serious consequences in Ukraine. At the same time, the relatively low usage of leniency and the historically modest scale of fines (in comparison to the size of the Ukrainian economy) suggest that enforcement is still maturing. Cultural shifts – encouraging compliance and internal corporate antitrust awareness – will take time, but the legislative and institutional framework now in place provides the necessary tools. The influence of EU competition law on Ukraine’s system has been profound and is poised to grow further as Ukraine advances toward EU accession. This influence is evident not only in the statutes and regulations (many of which replicate EU concepts like block exemptions, dominance thresholds, etc.) but also in substantive outcomes – for example, treating cartels as per se infringements unless justified, using European economic analysis techniques, and striving for deterrent sanctions akin to EU practice. The Association Agreement has effectively set a roadmap that Ukraine’s competition authority and lawmakers are diligently following, as seen by the 2023 “competition reform” law aligning procedural powers and fine enforcement with EU expectations. Such alignment serves a dual purpose: it readies Ukraine for deeper economic integration and also instills more confidence for businesses (domestic and foreign) that market rules in Ukraine are comparable to those in the EU, reducing regulatory arbitrage. In conclusion, Ukrainian competition law has developed considerably in its short history. The notion of “concerted practices”, once a nascent concept transplanted from Soviet law, has evolved into a sophisticated doctrine central to antitrust enforcement in Ukraine. The AMCU’s growing record in combating concerted anticompetitive actions – from local bid-rigging rings to nationwide cartels – demonstrates both the progress achieved and the continuing commitment to improve.

CHAPTER 5 – COMPARATIVE ANALYSIS AND CONCLUSIONS

5.1 Harmonizing Concepts and Judicial Frameworks in the EU and Ukraine

Both the European Union and Ukraine prohibit concerted practices that restrain competition, reflecting a shared commitment to safeguarding market rivalry. In EU competition law, the prohibition is anchored in Article 101(1) TFEU, which outlaws "agreements and concerted practices" between undertakings that have the object or effect of preventing, restricting or distorting competition.[159] Ukraine's regime, under the Law on Protection of Economic Competition 2001 (LPEC), employs analogous terminology: it broadly defines concerted actions (узгоджені дії) as any coordination between businesses, including agreements or understandings, that lead or may lead to the restriction of competition.[160] In essence, Ukrainian law mirrors the EU's conceptual approach – capturing coordination "in any form" that replaces independent decision-making with collective action – a result of Ukraine deliberately aligning its competition laws with the EU acquis pursuant to the 2014 EU–Ukraine Association Agreement.[161]

A foundational commonality is the treatment of concerted practices as a distinct category of collusion, alongside formal agreements. The Court of Justice of the EU (ECJ) famously defined a concerted practice in the Dyestuffs case (ICI v Commission, 1972) as a form of coordination "that knowingly substitutes practical cooperation for the risks of competition."[162] These captures situations where firms achieve mutual understanding without a formal agreement, thereby co-ordinating their conduct in the marketplace. Ukrainian law, in turn, does not use the term "cartel" in statutes, preferring the broader notion of anti-competitive concerted actions to encompass both explicit agreements and tacit collusion.[163] The practical import is similar: any collusive understanding – whether reached

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[159] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, art 101(1).

[160] Law of Ukraine 'On Protection of Economic Competition' No 2210-III (11 January 2001).

[161] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3, arts 253–256; Ksenia Smyrnova, 'Enforcement of Competition Rules in the Association Agreement between the EU and Ukraine' (2014) 7(10) *Yearbook of Antitrust and Regulatory Studies* 263; Iuliana Kikhaia, 'Approximation of the Ukraine Competition Law with the EU Law' (2015) 2 *European Studies* 212.

[162] *Imperial Chemical Industries Ltd v Commission* (Case 48/69) [1972] ECR 619 (Dyestuffs) paras 64–66.

[163] Igor Svechkar and others, 'Restraints of trade and dominance in Ukraine: overview' (Thomson Reuters Practical Law, 1 February 2021) <https://www.asterslaw.com/press_center/publications/restraints_of_trade_and_dominance_in_ukraine_overview1/> accessed 15 March 2026 (explaining that cartels are addressed as anticompetitive concerted practices under the Competition Law).

in a smoke-filled room or tacitly through signaling – can fall foul of competition law in both jurisdictions.

Despite these similarities, there are nuanced differences in legal architecture. EU law's Article 101 has a built-in exemption mechanism in Article 101(3) TFEU, allowing pro-competitive collaborations (e.g. joint ventures or distribution agreements that yield efficiency gains) to be exempted if strict criteria are met. This is paralleled in Ukraine by provisions allowing certain justifications and an authorization system: Ukrainian firms may apply to the Antimonopoly Committee of Ukraine (AMCU) for individual exemptions permitting concerted actions that improve production or promote technical progress, so long as consumers receive a fair share of the benefit.[164] Additionally, Ukraine has adopted block exemptions (for instance, a block exemption regulation for vertical agreements) similar to those in EU law, so that common distribution arrangements which are unlikely to harm competition (e.g. vertical agreements under certain market-share thresholds, absent hardcore restrictions) are automatically permitted.[165] This legislative mirroring demonstrates Ukraine's conscious effort to harmonize with European norms, providing a broadly familiar legal framework in which definitions and defences for concerted practices substantially overlap with the EU's.

One terminological distinction is worth noting: EU law speaks of agreements, decisions and concerted practices as separate forms of collusion, whereas Ukrainian law tends to subsume all such coordinated behavior under the single label of concerted actions. In practice, however, this difference is largely semantic. Both systems draw no substantive legal distinction in outcome based on whether collusion is formalized by agreement or achieved tacitly. The focus is on the effect on competition. In both jurisdictions, per se (or "by object") infringements are recognized: certain concerted practices (e.g. price-fixing,

[164] LPEC (n 160) arts 10(1)–(4) and 11(1)–(2) (providing for individual authorisation of concerted actions that, inter alia, improve production or promote technical, technological or economic development, and empowering the AMCU to adopt 'typical requirements' exempting specified categories of concerted actions).

[165] Antimonopoly Committee of Ukraine, Order No 10-рп (12 October 2017) 'On Approval of Typical Requirements for Vertical Concerted Actions of Undertakings and Amendments to Typical Requirements for Concerted Actions of Undertakings for General Exemption from Prior Permission of the Antimonopoly Committee of Ukraine'; CMS, 'Ukraine: Block-exemption regulation for vertical agreements adopted' (Law-Now e-alert, 19 December 2017) <https://cms-lawnow.com/en/ealerts/2017/12/ukraine-block-exemption-regulation-for-vertical-agreements-adopted> accessed 15 March 2026; OECD, 'Annual Report on Competition Policy Developments in Ukraine 2018' (DAF/COMP/AR(2019)55, 2019) 5–6 <https://one.oecd.org/document/DAF/COMP/AR(2019)55/en/pdf> accessed 15 March 2026 (noting that AMCU 'typical requirements' and block exemptions are based on the EU competition acquis).

market-sharing) are deemed so clearly harmful that they are illegal without need to prove actual market effects.[166] For example, the EU's seminal Consten & Grundig judgment (1966) established that once a practice has an anti-competitive object, "there is no need to take account of its concrete effects."[167] Ukrainian law similarly provides that anticompetitive concerted actions – defined in Article 6(1) LPEC as practices that have led or may lead to competition being prevented, limited or eliminated – are outright prohibited unless exempted.[168] Thus, a distributor cartel or a concerted retail price maintenance scheme would be considered illegal by object on either side, given its inherent tendency to restrict competition.

In summary, the EU and Ukrainian legal frameworks on concerted practices in distribution networks are built on the same foundations. Ukraine's competition law evolution – especially since the 2001 LPEC and subsequent amendments – demonstrates a conscious transplantation of EU principles and even language. The result is that conceptually, both jurisdictions embrace the same core doctrine: businesses must determine their conduct independently, and any knowing coordination that replaces the uncertainties of competition with cooperation is forbidden. This convergence sets the stage for a meaningful comparative analysis of how these principles are applied and enforced in practice.

5.2 Doctrinal Convergence and Divergence: Comparing Key Principles

5.2.1 Independence vs. Coordination: Conceptual Tests for Concertation

A fundamental principle in both EU and Ukrainian competition law is that competitors must act independently in the market. Collusion is the antithesis of this: any direct or indirect contact between firms which diminishes strategic uncertainty among them is suspect. The ECJ's Suiker Unie ruling (1975) articulated this clearly, warning that even indirect information exchanges that reveal a competitor's future intentions or influence its

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[166] *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* (Case C-8/08) [2009] ECR I-4529, paras 29–31 (holding that there is no need to examine actual effects where an anticompetitive object is established); *Consten SARL and Grundig-Verkaufs GmbH v Commission* (Joined Cases 56 and 58/64) [1966] ECR 299; Law of Ukraine 'On Protection of Economic Competition' (n 161) art 6(1)–(4).

[167] *Consten SARL and Grundig-Verkaufs GmbH v Commission* (Joined Cases 56 and 58/64) [1966] ECR 299.

[168] LPEC (n 160) art 6(1)–(4) (defining and prohibiting anticompetitive concerted actions that have led or may lead to the prevention, elimination or restriction of competition, and stating that such actions are prohibited unless cleared or exempted under arts 7–10).

conduct are incompatible with the obligation of independence.[169] This principle is equivalently recognized in Ukraine. The AMCU and Ukrainian courts regard "any form of coordination" that substitutes collaboration for independent decision-making as a concerted action,[170] echoing the Suiker Unie dictum almost verbatim. In other words, whether competitors share future pricing plans through a gentleman's agreement or via an intermediary, the essence of the violation is the same: the competitive process is subverted by mutual understanding.

Both jurisdictions also confront the line between mere conscious parallelism (lawful behavior where firms independently but knowingly match each other's moves) and an actual concerted practice (unlawful coordination). EU doctrine maintains that parallel conduct by itself is not proof of a concerted practice there must be evidence of some contact or "meeting of minds" to distinguish collusion from coincidence. Ukraine's approach aligns with this: Article 6(3) of the LPEC creates a rebuttable presumption of concerted action if competitors engage in similar behavior with no other plausible explanation, but in application this still requires ruling out independent causes. Indeed, Ukrainian courts have been careful to insist that parallel pricing alone is not illegal absent proof that it resulted from communication between firms rather than each firm's unilateral market response.[171]

Where the two systems diverge slightly is in how this line is policed. EU case law has developed nuanced evidentiary presumptions to bridge gaps in direct proof. For instance, the T-Mobile Netherlands judgment (2009) held that even a single meeting between competitors to share sensitive information suffices to establish a concerted practice by object – and critically, if competitors then behave in line with what was discussed, a causal

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[169] *Coöperatieve Vereniging "Suiker Unie" UA and Others v Commission* (Joined Cases 40–48/73 etc) [1975] ECR 1663, paras 173–174 (affirming that any direct or indirect contact between competitors which removes uncertainty about their future conduct is incompatible with the duty of independence).

[170] OECD, *OECD Reviews of Competition Law and Policy: Ukraine 2016* (OECD Publishing 2016) 31–33 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2016/12/oecd-reviews-of-competition-law-and-policy-ukraine-2016_51d9bb98/3f9077f9-en.pdf> accessed 15 March 2026 (describing 'concerted practice' as agreements and 'any other concerted competitive behaviour or omission' and noting that establishing a joint vehicle/association can itself amount to a concerted practice); Higher Commercial Court of Ukraine, 'On certain issues of practice of application of competition legislation' (Resolution No 15, 26 December 2011, as amended 10 July 2014) < https://zakon.rada.gov.ua/laws/show/v0015600-11 > accessed 15 March 2026.

[171] Supreme Court (Commercial Cassation Court), judgment of 28 July 2022, case No 910/702/17 (Ukraine) paras 8.39–8.41 (stressing that similar conduct may be qualified as anticompetitive concerted actions only if objective reasons are excluded); Supreme Court (Commercial Cassation Court), judgment of 7 December 2021, case No 910/10412/19 (Ukraine) para 229 (holding that parallel pricing alone is insufficient without proof of coordinated behaviour).

connection to the meeting is presumed.[172] The Court stated that once companies engage in a concerted action, they "are presumed to take account of the information exchanged with their competitors when determining their conduct on the market", so that an infringement is made out unless they can rebut that presumption.[173] Additionally, EU law (through cases like Anic and Aalborg Portland) presumes that if a company participates in anti-competitive meetings without publicly distancing itself, it is a willing party to the collusion.[174] These judicial presumptions – effectively shifting the burden to the defendants once certain facts are shown – have no explicit counterpart in Ukrainian jurisprudence yet.

Ukraine's Article 6(3) presumption can be seen as a legislative analogue, Ukrainian courts, however, have applied it cautiously. A vivid illustration is the AMCU's "Retailers' Cartel" case (2015), which concerned an information exchange among leading supermarket chains via a third-party data provider (AC Nielsen). The AMCU inferred a concerted practice from the retailers' lockstep pricing behavior combined with their participation in a shared data exchange platform, invoking Article 6(3) to presume collusion from parallel outcomes.[175] However, several Ukrainian courts on appeal were not convinced that the observed parallel price changes could only be explained by collusion; they pointed to the possibility of conscious parallelism (each chain reacting to market signals) and overturned a number of the AMCU's fines for insufficient proof of a "common will."[176] Thus, in Ukraine the judiciary has effectively demanded a degree of evidence that might be deemed met – via presumptions – under EU case law.

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[172] T-Mobile Netherlands (n 166) paras 31–36, 39–41 (finding that a single meeting at which competitors exchange strategically sensitive information may be sufficient to establish a concerted practice by object).
[173] Ibid, paras 51–53 (holding that undertakings which participate in a concerted action are presumed to take account of the information exchanged when determining their conduct on the market, so that an infringement is established unless they rebut that presumption).
[174] *Commission v Anic Partecipazioni SpA* (Case C-49/92 P) EU:C:1999:356, [1999] ECR I-4125, paras 86–99 (on participation in a single and continuous infringement and the evidential consequences of attending cartel meetings); *Aalborg Portland A/S and Others v Commission* (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P) EU:C:2004:6, [2004] ECR I-123, paras 81–90 (confirming that an undertaking which takes part in anti-competitive meetings and does not publicly distance itself may be treated as a participant in the collusion).
[175] Antimonopoly Committee of Ukraine, Decision No 182-p (29 April 2015) in case No 242-26.13/150-12 [information exchange between major food retailers and 'AC Nielsen Ukraine' leading to coordinated pricing] (in Ukrainian) <https://amcu.gov.ua/npas/vityag-iz-rishennya-182-r-vid-29042015> accessed 15 March 2026.
[176] Higher Commercial Court of Ukraine, judgment of 13 November 2017, case No 910/17678/15 (Ukraine) (upholding lower-court findings that the AMCU's conclusion of collusion in the Nielsen/retailers case was not supported by sufficient evidence and that parallel price movements could have alternative explanations).

Despite this difference in evidentiary approach, the doctrinal endpoint is similar. Both EU and Ukrainian law require a “meeting of minds” of some sort to condemn concerted behavior; they diverge in how readily that inference is drawn from circumstantial evidence. The EU’s longer-established case law has tended to be more assertive in filling evidentiary gaps (to avoid false negatives that would let cartels escape). Ukraine’s courts, still developing trust in economic evidence, have so far been more reluctant to infer illegal concertation without a relatively high degree of proof. This may evolve as Ukrainian enforcers and judges grow more accustomed to handling complex cartel cases, potentially learning from the EU’s experience in drawing reasonable inferences about collusion.

5.2.2 Case Study Insights: ECJ case-law and its Ukrainian Parallels

The abstract principles described above come to life in concrete cases. A comparative look at emblematic case studies from the EU and Ukraine reveals both common themes and divergent outcomes, offering valuable lessons.

Information Exchanges and Presumptions: The EU’s T-Mobile Netherlands case (ECJ, 2009) is instructive on how strictly anti-collusion rules apply even to fleeting contacts. In T-Mobile, five Dutch telecom operators had a single meeting where future reductions in dealer commissions were discussed. The ECJ held that this one encounter sufficed to find a concerted practice by object, emphasizing that even a one-off exchange of strategic information can be illegal because it reduces uncertainty in the market. The Court further established a crucial presumption: once companies participate in such an information exchange, it is presumed that their subsequent market conduct is influenced by it (unless proven otherwise). This “once is enough” stance reflects the EU’s preventive approach – nipping collusion in the bud. Now compare Ukraine: while there has not been an identical high-profile case, the spirit of T-Mobile is embedded in Ukrainian law’s broad view of concerted actions. The AMCU would likewise consider a single meeting or discussion among competitors unlawful if it involves coordination of behavior or sensitive information. In practice, however, Ukraine’s courts have yet to endorse a per se inference as strong as T-Mobile’s. For example, in a 2016 case involving an alleged concerted action among fuel retailers to share pricing intentions (an analogy to T-Mobile), Ukrainian courts demanded evidence that the meeting actually influenced prices before upholding an infringement.[177] Thus, while the legal standard on paper is similar, the evidentiary bar in Ukraine has de facto been higher – a difference that may be gradually reconciled as Ukrainian jurisprudence evolves and perhaps explicitly draws on EU precedent in future.

Platform-Facilitated Collusion – Eturas and Nielsen: The use of common platforms or IT systems to coordinate competitors' behavior presents another parallel. In the EU, the Eturas case (ECJ, 2016) broke new ground. The ECJ held that if an undertaking "could reasonably have accessed" the notice about the restriction, it can be presumed to have acquiesced in the concerted practice unless it publicly distanced itself.[178] In other words, silence in the face of a centrally imposed collusive measure was taken as tacit agreement. The Eturas judgment thus adapted traditional concerted practice doctrine to a modern hub-and-spoke scenario: the hub being an IT platform and the spokes being the users who were indirectly coordinating via that hub. Crucially, the Court found a concerted practice despite no direct communication among the competitors the platform's action and the users' parallel compliance constituted the "meeting of minds."

Ukraine confronted a strikingly similar scenario with the Nielsen case (the retailers' information exchange case discussed earlier). Here, AC Nielsen's data-sharing service functioned as a hub that disseminated each retailer's sensitive information (sales, prices, stock levels) to all others in real time, enabling them to align their pricing strategies. The AMCU viewed this as analogous to a continuous platform mediated cartel: competitors were not meeting or explicitly agreeing, but through the shared service they achieved a form of uniform market conduct. In its 2015 decision, the AMCU explicitly cited the reduction of uncertainty and the alignment of commercial behavior as reasons to condemn the practice. On a conceptual level, this aligns perfectly with EU doctrine (indeed, the facts are conceptually akin to use of price-monitoring software flagged in the EU's e-commerce

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[177] Sergiy Glushchenko and Oleksandr Voznyuk, 'Antimonopoly Committee of Ukraine – What is behind EUR 7 Million Fine on Seven Alleged Road Fuel Cartelists' (Kluwer Competition Law Blog, 2 February 2017) <https://legalblogs.wolterskluwer.com/competition-blog/antimonopoly-committee-of-ukraine-what-is-behind-eur-7-million-fine-on-seven-alleged-road-fuel-cartelists/ > accessed 15 March 2026.

[178] *'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba* (Case C-74/14) EU:C:2016:42; Bartosz Targański, 'Antitrust liability in the context of online platforms: Case comment on *Eturas* (C-74/14)' (2016) 9(14) *Yearbook of Antitrust and Regulatory Studies* 291.

inquiry[179]). However, the enforcement outcomes diverged. The AMCU's decision in Nielsen was largely overturned in court due to doubts about evidence, whereas in Eturas the infringement finding was ultimately upheld against the travel agencies (on the national level following the ECJ's guidance). The difference highlights a gap in institutional effectiveness rather than doctrinal disagreement: Ukrainian law could catch the same conduct that Eturas addressed, but making the case stick proved more difficult under Ukraine's then-prevailing standards of proof. Nonetheless, the analogy between Eturas and the Nielsen case has been noted by Ukrainian commentators as evidence that Ukrainian competition law identifies the same risks in platform-driven concertation as EU law does.[180] It also serves as a learning experience: after Nielsen, the AMCU recognized the need for more robust economic analysis and perhaps direct evidence when tackling algorithmic or IT-facilitated collusion, to satisfy judicial scrutiny. In future cases, Ukrainian enforcers may take a page from Eturas by emphasizing the known presence and tolerance of a collusive hub as sufficient to infer a concerted action.

Vertical "Hub-and-Spoke" Arrangements: Distribution networks often entail vertical relationships (suppliers to distributors) which can serve as the conduit for horizontal collusion (between distributors). The EU established early on, in Musique Diffusion Française v Commission (1983) – known as the Pioneer case– that a supplier orchestrating a distribution network can be liable for a concerted practice if it facilitates collusion among its distributors.[181] The Pioneer judgment is essentially the EU's prototype hub-and-spoke case, where the supplier was the hub enabling distributors (the spokes) to collude on market division.

Ukraine's competition law likewise covers vertical agreements that lead to horizontal effects. Article 5 LPEC explicitly mentions that decisions by associations or any coordinated

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[179] European Commission, *Final Report on the E-Commerce Sector Inquiry* COM(2017) 229 final (10 May 2017) para 13 <https://competition-policy.ec.europa.eu/system/files/2021-10/2017_ecommerce_SI_final_report_en.pdf> accessed 15 March 2026 (noting the widespread use of software to monitor online prices may in some situations, depending on the market conditions, raise competition concerns).

[180] Sergiy Glushchenko, 'AC Nielsen and Ukrainian retail information exchange' (2015) e-Competitions Bulletin (No 76613) (commenting on the AMCU's Nielsen decision as a platform-based hub for sharing sensitive data among retailers); Timur Bondaryev, 'When Distribution Triggers Cartel Risks' in *Ukrainian Law Firms: A Handbook for Foreign Clients* (Yurydychna Praktyka Publishing 2013/2014) <http://sd.yurpractika.com.ua/practice/128/> accessed 15 March 2026.

[181] *SA Musique Diffusion française and Others v Commission* (Joined Cases 100–103/80) [1983] ECR 1825 (Pioneer).

conduct, even if among non-competitors, can qualify as concerted actions if they coordinate competitive behavior. Ukraine has dealt with a few notable vertical collusion cases in distribution networks. For example, in 2016 the AMCU investigated major oil distributors and their exclusive supplier for allegedly agreeing to fix fuel prices and divide markets – a scenario analogous to Pioneer, with the supplier at the center.[182] The AMCU found a violation, treating the arrangement as a concerted practice that removed competition among the fuel retailers. Although each case turns on facts, the legal reasoning drew from the same principle: using a vertical relationship to coordinate downstream competitors is illegal. One difference, however, is enforcement philosophy. EU law, through the Vertical Block Exemption and Guidelines, generally permits many vertical restraints (acknowledging their efficiency potential) but draws a hard line at those that facilitate horizontal collusion (e.g. a supplier acting as a conduit for information exchange among dealers is strictly unlawful[183]). Ukrainian law also allows benign vertical restraints under block exemptions, but the AMCU tends to cast a wary eye on arrangements in highly concentrated markets where a dominant supplier's policies can unify reseller conduct. In practice, both systems would condemn, say, a scenario of a "hub-and-spoke" price-fixing: if a manufacturer told all its distributors a target resale price and made sure each knew that others would also comply, this would be treated as a concerted practice among the distributors with the manufacturer as instigator. The UK (while in the EU) famously pursued such a case in Argos & Littlewoods v OFT (the toys cartel case), and one can foresee the AMCU doing likewise should a clear-cut hub-and-spoke scheme emerge in a Ukrainian distribution sector.

The comparative thread running through these examples is that contextual differences in proof and process can lead to divergent outcomes, even where legal principles align. EU case law displays a mature, expansive application of the concerted practices doctrine – catching one-off meetings (T-Mobile), tacit approval of platform restrictions (Eturas), and vertical facilitation of cartels (Pioneer) with relative ease. Ukrainian

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[182] 'Cartels Laws and Regulations 2025: Ukraine' (Global Legal Insights, 29 April 2025) <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/ukraine/> accessed 15 March 2026 (for an overview of AMCU enforcement in the fuel sector, including cases involving alleged price-fixing and market-sharing between fuel retailers and suppliers).

[183] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices [2022] OJ L 134/4, art 4(a); Commission Notice – Guidelines on vertical restraints [2022] OJ C 248/1, paras 96–100, 188 (treating suppliers that facilitate information exchange between competing distributors or impose resale price maintenance as engaging in hardcore restrictions).

enforcement, operating under the same conceptual umbrella, has the tools to reach similar results but has sometimes encountered turbulence (as in Nielsen) due to the judiciary's caution and the newness of such issues. Over time, as Ukrainian courts draw confidence from international precedent and as the AMCU refines its case-building (incorporating economic evidence and perhaps direct communications where possible), we can expect closer parity in outcomes. The lessons from EU cases are explicitly guiding Ukrainian practice: indeed, Ukraine's judges and enforcers increasingly cite EU judgments and decisional practice as persuasive authority. This cross-pollination is a cornerstone of Ukraine's competition policy modernization.

5.3 Contemporary Challenges: Algorithms, Platforms, and the Future of Concerted Practices

The digital age is stress-testing the legal concepts of concerted practices in both the EU and Ukraine. Two interrelated challenges stand out: algorithmic collusion and "hub-and-spoke" arrangements in online platforms and data-driven markets. Both pose the question: how well do traditional rules – forged in an era of human-to-human cartels – address coordination that is mediated by technology or novel market structures?

Using pricing algorithms or AI tools that end up coordinating prices among competitors, either intentionally or through autonomous learning, without explicit agreement is testing the limits of concerted practice doctrine. The EU and Ukraine both acknowledge that "agreements by code" or collusion through algorithms must not slip through gaps.[184] The EU is actively updating guidelines and exploring policy tools, while Ukraine is alert and has hinted at creative enforcement (and even regulatory) solutions, such as demanding transparency (so that hidden coordination mechanisms come to light). Both jurisdictions will likely benefit from continued international cooperation on this issue, sharing techniques to detect algorithmic collusion and possibly coordinating new legal standards. It is foreseeable that proof of concertation may evolve – for instance, regulators might use algorithm audits to establish that competing AI systems were implicitly signaling to each other, thereby constructing a circumstantial case of concerted practice even absent human agreement.

[184] OECD, 'Algorithmic competition – Note by the European Union' (DAF/COMP/WD(2023)17, 24 May 2023) <https://one.oecd.org/document/DAF/COMP/WD(2023)17/en/pdf> accessed 15 March 2026.

The hub-and-spoke collusion model, as discussed, occurs when a vertical player (the "hub") enables horizontal collusion between downstream or upstream firms (the "spokes"). While not new (Pioneer was an early example), it has gained contemporary relevance with the rise of platforms and franchised networks. Both EU and Ukrainian competition authorities are attentive to this, as evidenced by cases and guidelines.

One challenge for both jurisdictions is detecting hub-and-spoke collusion, as it often masquerades as normal vertical conduct. It requires evidence of the link between spokes via the hub – often a paper trail or testimony that information passed through. Leniency applications can be particularly useful here (e.g. if one distributor comes forward to confess a supplier-mediated cartel). Absent insider evidence, authorities must piece together indirect evidence (communications, parallel actions timed with hub communications, etc.). The proof difficulties again surfaced in Ukraine's Nielsen case: the AMCU had some direct evidence (e.g. a standard contract clause all retailers had with Nielsen about data sharing) and lots of economic evidence of parallel pricing but perhaps lacked a "smoking gun" showing a deliberate common plan. In contrast, many EU hub-and-spoke cases had at least some explicit communication (like a supplier email: "All retailers must keep price X"). As Ukraine refines its methods, one recommendation could be to issue guidelines or notices clarifying hub-and-spoke scenarios, to put industry on notice and to guide courts. The EU's own experience, including appellate rulings in the UK (e.g. the UK Court of Appeal's judgment in Argos (2006), which set out how to infer the requisite "meeting of minds" in hub-and-spoke cases), could inform Ukrainian doctrine.

5.4 Concluding Reflections

In concluding this comparative exploration, it is evident that concerted practices in distribution networks are a challenge that transcends borders, yet one that the EU and Ukraine are tackling on convergent paths. The EU's half-century of jurisprudence, from Consten & Grundig through T-Mobile and Eturas, provides a robust doctrinal foundation emphasizing substance over form – i.e., catching coordination in whatever guise it appears. Ukraine, in transforming its competition law over the past three decades, has embraced these same substantive principles and woven them into its own legal fabric, even as it navigates the practical hurdles of enforcement and institution-building in a transitioning economy. The comparative lens reveals that key pillars are shared: a prohibition on coordination that replaces independent action, a flexible concept of "concerted action" that can stretch to new business realities, and an acknowledgment that some cooperation can be benign (or even beneficial) and thus must be carefully distinguished from cartel behavior.

Crucially, this study also highlights the dynamics of legal transplantation and integration. Ukraine's competition law did not develop in isolation; it was deliberately modeled on European law as part of a broader strategy of economic integration and reform. This has yielded clear benefits: Ukrainian enforcers and courts, when faced with a novel issue like algorithmic collusion, can draw on a rich body of EU analysis 13 and case law for guidance. Conversely, Ukraine's experiences (such as the judicial pushback in the retailers' cartel case or the inventive approach in BlaBlaCar) offer lessons to the EU – a reminder that legal rules must continually prove their effectiveness on the ground, and that sometimes statutes (like Ukraine's Article 6(3) presumption) may innovate ahead of case law. The dialogue between the two systems is therefore mutually enriching.

For policymakers and scholars, the comparative insights suggest optimism: convergence in competition law is not only possible but is largely being achieved here. The remaining differences are surmountable through ongoing legal approximation, capacity development, and shared resolve. Both the EU and Ukraine recognize that concerted practices pose a serious threat to fair distribution networks – be it wholesalers rigging prices, retailers exchanging data, or online platforms facilitating covert collusion. Both are adapting their arsenals to counter these threats in a timely manner.

In a world where supply chains and markets are increasingly interconnected (and where Ukraine's economic fate is ever more intertwined with Europe's), maintaining a coherent and effective competition law approach to collusion is essential. The enforcement of anti-collusion rules in distribution networks ensures that consumers benefit from genuine price competition and choice, rather than a facade of competition hiding a cartel. As we advance, challenges like digitalization will persist, but so too will the ingenuity of antitrust enforcement. The EU's legacy of strong cartel enforcement and Ukraine's demonstrated commitment to reform make for a promising alliance in this regard.

In sum, concerted practices in distribution networks will continue to be rigorously policed in both jurisdictions, with a clear trend toward harmonization of standards and strategies. The final recommendation is one of continued vigilance and cooperation: the fight against collusion is ongoing, and success will depend on regulators staying ahead of colluders’ tactics, legislatures ensuring laws remain fit for purpose, and courts upholding the competition principles that lie at the heart of both EU and Ukrainian law. Through these efforts, distribution networks – whether traditional or digital, in Brussels or in Kyiv – can function in an open and competitive manner, to the ultimate benefit of consumers and economies at large.

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